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Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council

In my letter of 8 October 2004, I informed you and the members of the Security Council of my decision to appoint a five-member Commission of Inquiry to investigate reports of violations of international humanitarian law and human rights law in Darfur, Sudan. I requested the Commission to carry out the task within a period of three months and submit its report to me.

Attached please find the report submitted to me by the Commission.

(*Signed*) Kofi A. **Annan**

Report of the International Commission of Inquiry on Darfur to the Secretary-General

Pursuant to Security Council resolution 1564 (2004) of 18 September 2004

Summary

Acting under Chapter VII of the Charter of the United Nations, on 18 September 2004 the Security Council adopted resolution 1564 (2004), in which it requested, inter alia, that the Secretary-General rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.

In October 2004, the Secretary-General appointed Antonio Cassese (Chairperson), Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott as members of the Commission and requested that they report back on their findings within three months. The Commission was supported in its work by a secretariat headed by an Executive Director, Mona Rishmawi, as well as a legal research team and an investigative team composed of investigators, forensic experts, military analysts, and investigators specializing in gender violence, all appointed by the Office of the United Nations High Commissioner for Human Rights. The Commission assembled in Geneva and began its work on 25 October 2004.

In order to discharge its mandate, the Commission endeavoured to fulfil four key tasks: (1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide have occurred; (3) to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur; and (4) to suggest means of ensuring that those responsible for such violations are held accountable. While the Commission considered all events relevant to the current conflict in Darfur, it focused in particular on incidents that occurred from February 2003 and mid-January 2005.

The Commission engaged in a regular dialogue with the Government of the Sudan throughout its mandate, in particular through meetings in Geneva and in the Sudan, as well as through the work of its investigative team. The Commission visited the Sudan from 7 to 21 November 2004 and from 9 to 16 January 2005, including travel to the three Darfur States. The investigative team remained in Darfur from November 2004 to January 2005. During its presence in the Sudan, the Commission held extensive meetings with representatives of the Government, the Governors of the Darfur States and other senior officials in the capital and at provincial and local levels, members of the armed forces and police, leaders of rebel forces, tribal leaders, internally displaced persons, victims and witnesses of violations, non-governmental organizations and United Nations representatives.

The Commission submitted a full report on its findings to the Secretary-General on 25 January 2005. The report describes the terms of reference, methodology, approach and activities of the Commission and its investigative team. It also provides an overview of the historical and social background to the conflict

in Darfur. The report then addresses in detail the four key tasks referred to above, namely the Commission's findings in relation to: (1) violations of international human rights and humanitarian law by all parties; (2) whether or not acts of genocide have taken place; (3) the identification of perpetrators; and (4) accountability mechanisms. These four parts are briefly summarized below.

I. Violations of international human rights law and international humanitarian law

In accordance with its mandate to investigate reports of violations of human rights law and international humanitarian law, the Commission carefully examined reports from different sources including Governments, intergovernmental organizations, United Nations bodies and mechanisms, as well as non-governmental organizations.

The Commission took as the starting point for its work two irrefutable facts regarding the situation in Darfur. First, according to United Nations estimates there are 1.65 million internally displaced persons in Darfur, and more than 200,000 refugees from Darfur in neighbouring Chad. Secondly, there has been large-scale destruction of villages throughout the three States of Darfur. The Commission conducted independent investigations to establish additional facts and gathered extensive information on multiple incidents of violations affecting villages, towns and other locations across Northern, Southern and Western Darfur. The conclusions of the Commission are based on the evaluation of the facts gathered or verified through its investigations.

Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large-scale attacks, many people have been arrested and detained, and many have been held incommunicado for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Masalit, Jebel, Aranga and other so-called "African" tribes.

In their discussions with the Commission, Government of the Sudan officials stated that any attacks carried out by Government armed forces in Darfur were for counter-insurgency purposes and were conducted on the basis of military imperatives. However, it is clear from the Commission's findings that most attacks were deliberately and indiscriminately directed against civilians. Moreover even if rebels, or persons supporting rebels, were present in some of the villages — which the Commission considers likely in only a very small number of instances — the attackers did not take precautions to enable civilians to leave the villages or otherwise be shielded from attack. Even where rebels may have been present in villages, the impact of the attacks on civilians shows that the use of military force was manifestly disproportionate to any threat posed by the rebels.

The Commission is particularly alarmed that attacks on villages, killing of civilians, rape, pillaging and forced displacement have continued during the course of the Commission's mandate. The Commission considers that action must be taken urgently to end these violations.

While the Commission did not find a systematic or a widespread pattern to these violations, it found credible evidence that rebel forces, namely members of SLA and JEM, also are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, these violations include cases of murder of civilians and pillage.

II. Have acts of genocide occurred?

The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

The Commission does recognize that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case-by-case basis.

The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.

III. Identification of perpetrators

The Commission has collected reliable and consistent elements which indicate the responsibility of some individuals for serious violations of international human rights law and international humanitarian law, including crimes against humanity or war crimes, in Darfur. In order to identify perpetrators, the Commission decided that there must be a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime. The Commission therefore makes an assessment of likely suspects, rather than a final judgement as to criminal guilt.

Those identified as possibly responsible for the above-mentioned violations consist of individual perpetrators, including officials of the Government of the Sudan, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity. Some Government officials, as well as members of militia forces, have also been named as possibly responsible for joint criminal enterprise to commit international crimes. Others are identified for their possible involvement in planning and/or ordering the commission of international crimes, or of aiding and abetting the perpetration of such crimes. The Commission has also identified a number of senior Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are named as suspected of participating in a joint criminal enterprise to commit international crimes, and as possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels.

The Commission has decided to withhold the names of these persons from the public domain. This decision is based on three main grounds: (1) the importance of the principles of due process and respect for the rights of the suspects; (2) the fact that the Commission has not been vested with investigative or prosecutorial powers; and (3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead will list the names in a sealed file that will be placed in the custody of the United Nations Secretary-General. The Commission recommends that the file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court, according to the Commission's recommendations), who will use that material as he or she deems fit for his or her investigations. A distinct and very voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the United Nations High Commissioner for Human Rights. That file should be delivered to a competent prosecutor.

IV. Accountability mechanisms

The Commission strongly recommends that the Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant to article 13(b) of the Statute of the Court. As repeatedly stated by the Security Council, the situation constitutes a threat to international peace and security. Moreover, as the Commission has confirmed, serious violations of international human rights law and humanitarian law by all parties are continuing. The prosecution by the International Criminal Court of persons allegedly responsible for the most serious crimes in Darfur would contribute to the restoration of peace in the region.

The alleged crimes that have been documented in Darfur meet the thresholds of the Rome Statute as defined in articles 7 (1), 8 (1) and 8 (f). There is an internal armed conflict in Darfur between the governmental authorities and organized armed groups. A body of reliable information indicates that war crimes may have been committed on a large scale, at times even as part of a plan or a policy. There is also a wealth of credible material which suggests that criminal acts were committed as part of widespread or systematic attacks directed against the civilian population, with knowledge of the attacks. In the opinion of the Commission therefore, these may amount to crimes against humanity.

The Sudanese justice system is unable and unwilling to address the situation in Darfur. The system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive have undermined the effectiveness of the judiciary, and many of the laws in force in the Sudan today contravene basic human rights standards. Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of those acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. In any case, many have feared reprisals in the event that they resort to the national justice system.

The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur. Very few victims have lodged official complaints regarding crimes committed against them or their families, owing to a lack of confidence in the justice system. Of the few cases where complaints have been made, most have not been properly pursued. Furthermore, procedural hurdles limit the victims' access to justice. Despite the magnitude of the crisis and its immense impact on civilians in Darfur, the Government informed the Commission of very few cases of individuals who have been prosecuted, or even disciplined, in the context of the current crisis.

The Commission considers that the Security Council must act not only against the perpetrators but also on behalf of the victims. It therefore recommends the establishment of a compensation commission designed to grant reparation to the victims of the crimes, whether or not the perpetrators of such crimes have been identified.

It further recommends a number of serious measures to be taken by the Government of the Sudan, in particular (1) ending the impunity for the war crimes and crimes against humanity committed in Darfur; (2) strengthening the independence and impartiality of the judiciary, and empowering courts to address human rights violations; (3) granting full and unimpeded access by the International Committee of the Red Cross and United Nations human rights monitors to all those detained in relation to the situation in Darfur; (4) ensuring the protection of all the victims and witnesses of human rights violations; (5) enhancing the capacity of the Sudanese judiciary through the training of judges, prosecutors and lawyers; (6) respecting the rights of internally displaced persons and fully implementing the Guiding Principles on Internal Displacement, particularly with regard to facilitating the voluntary return of internally displaced persons in safety and dignity; (7) fully cooperating with the relevant human rights bodies and mechanisms of the United Nations and the African Union; and (8) creating, through a broad consultative process, a truth and reconciliation commission once peace is established in Darfur.

The Commission also recommends a number of measures to be taken by other bodies to help break the cycle of impunity. They include the exercise of universal jurisdiction by other States, the re-establishment by the Commission on Human Rights of the mandate of the Special Rapporteur on human rights in the Sudan, and public and periodic reports on the human rights situation in Darfur by the United Nations High Commissioner for Human Rights.

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Introduction

A. The role of the Commission of Inquiry

1. Establishment of the Commission

1. The International Commission of Inquiry on Darfur was established pursuant to United Nations Security Council resolution 1564 (2004), adopted on 18 September 2004. In the resolution, adopted under Chapter VII of the Charter of the United Nations, the Council requested the Secretary-General rapidly to set up the Commission. In October 2004 the Secretary-General appointed a five-member body, comprising Antonio Cassese (Italy), Mohammed Fayek (Egypt), Hina Jilani (Pakistan), Dumisa Ntsebeza (South Africa) and Theresa Striggner-Scott (Ghana), and designated Mr. Cassese as its Chairman. The Secretary-General decided that the Commission's staff should be provided by the Office of the United Nations High Commissioner for Human Rights. Mona Rishmawi was appointed Executive Director of the Commission and head of its staff. The Commission assembled in Geneva and began its work on 25 October 2004. The Secretary-General requested the Commission to report to him within three months, i.e., by 25 January 2005.

2. Terms of reference

2. In paragraph 12 of resolution 1564 (2004), the following tasks are set out for the Commission: to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; to determine also whether or not acts of genocide have occurred; and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable. Under the resolution, these tasks must be discharged immediately.

3. The first of the tasks set out above implies that the Commission, rather than investigating alleged violations, must investigate "reports" of such violations committed by all parties. This means that it is mandated to establish facts relating to possible violations of international human rights and humanitarian law committed in Darfur. In this respect the Commission must act as a fact-finding body, beginning with an assessment of information contained in the various reports made by other bodies including Governments, United Nations bodies, organs of other intergovernmental organizations, and non-governmental organizations.

4. It also falls to the Commission to characterize, from the viewpoint of international criminal law, the violations of international human rights law and humanitarian law it may establish. This legal characterization is implicitly required by the further tasks of the Commission set out by the Security Council, namely, (a) to establish whether those violations amount to genocide, and (b) to identify the perpetrators. Clearly, the Commission may not be in a position to fulfil these tasks if it has not previously established (a) whether the violations amount to international crimes, and, if so, (b) under what categories of crimes they fall (war crimes, crimes against humanity, genocide, or other crimes). This classification is required not only for the purpose of determining whether those crimes amount to genocide but also for the process of identifying the perpetrators. In order to name particular persons as suspected perpetrators, it is necessary to define the international crimes for which they may be held responsible.

5. The second task with which the Security Council entrusted the Commission is that of legally characterizing the reported violations with a view to ascertaining whether they amount to genocide.

6. The third task is that of identifying the perpetrators of violations with a view to ensuring that those responsible are held accountable. This requires the Commission not only to identify the perpetrators but also to suggest possible mechanisms for holding those perpetrators accountable. The Commission must therefore collect a reliable body of material that indicates which individuals may be responsible for violations committed in Darfur and who should consequently be brought to trial with a view to determining their liability. The Commission has not been endowed with the powers proper to a prosecutor; in particular, it may not subpoena witnesses, or order searches or seizures, nor may it request a judge to issue arrest warrants against suspects. It may rely only upon the obligation of the Government of the Sudan and the rebels to cooperate. Its powers are therefore limited by the manner in which the Government and the rebels fulfil that obligation.

7. In order to discharge its mandate in conformity with the international law that it is bound to apply, the Commission has to interpret the word "perpetrators" as covering the executioners or material authors of international crimes, as well as those who may have participated in the commission of such crimes under the notion of joint criminal enterprise, or ordered their perpetration, or aided or abetted the crimes, or in any other manner taken part in their perpetration. The Commission has included in this inquiry those who may be held responsible for international crimes, under the notion of superior responsibility, because they failed to prevent or repress the commission of such crimes although they (a) had (or should have had) knowledge of their commission, and (b) wielded control over the persons who perpetrated them. This interpretation is justified by basic principles of international criminal law, which provide that individual criminal responsibility arises when a person materially commits a crime, as well as when he or she engages in other forms or modalities of criminal conduct.

8. Furthermore, the language of the Security Council resolution makes it clear that the request to identify perpetrators is with a view to ensuring that those responsible are held accountable. In paragraph 7 of the resolution the Council reiterates its request to the Government of the Sudan to end the climate of impunity in Darfur and to bring to justice *all those responsible*, including members of popular defence forces and Janjaweed militias for violations of human rights law and international humanitarian law (emphasis added). Furthermore, the tasks of the Commission include that of ensuring that those responsible are held accountable. Thus, the Security Council has made it clear that it intends that the Commission identify all those responsible for alleged international crimes in Darfur. This is corroborated by an analysis of the objective of the Security Council: if this body aimed at putting an end to atrocities, why should the Commission confine itself to the material perpetrators, given that those who bear the greatest responsibility normally are the persons who are in command, and who either plan or order crimes, or knowingly condone or acquiesce in their perpetration?

9. This interpretation is also in keeping with the wording of the same paragraph in other official languages. It is true that in many cases a superior may not be held to have taken part in the crimes of his or her subordinates, in which case he or she would not be regarded as a perpetrator or author of those crimes. In those instances

where criminal actions by subordinates are isolated episodes, the superior may be responsible only for failing to submit the matter to the competent authorities for investigation and prosecution.[1] In such instances, unquestionably the superior may not be considered as the author of the crime perpetrated by his or her subordinates. However, when crimes are committed regularly and on a large scale, as part of a pattern of criminal conduct, the responsibility of the superior is more serious. By failing to stop the crimes and to punish the perpetrators, he or she in a way takes part in their commission.

10. The fourth task assigned to the Commission therefore is linked to the third and is aimed at ensuring that those responsible are held accountable. To this effect, the Commission intends to propose measures for ensuring that those responsible for international crimes in Darfur are brought to justice.

11. As is clear from the relevant Security Council resolution, the Commission is mandated to consider only the situation in the Darfur region of the Sudan. With regard to the time frame, the Commission's mandate is inferred by the resolution. While the Commission considered all events relevant to the current conflict in Darfur, it focused in particular on incidents that occurred from February 2003, when the magnitude, intensity and consistency of incidents noticeably increased, until mid-January 2005, just before the Commission was required to submit its report.

3. Working methods

12. As stated above, the Commission started its work in Geneva on 25 October 2004. It immediately discussed and agreed upon its terms of reference and methods of work. On 28 October it sent a note verbale to Member States and intergovernmental organizations, and on 2 November it sent a letter to non-governmental organizations, providing information about its mandate and seeking relevant information. It also posted information on its mandate, composition and contact details on the web site of the Office of the United Nations High Commissioner for Human Rights (www.ohchr.org).

13. The Commission agreed at the outset that it would discharge its mission in strict confidentiality. In particular, it would limit its contacts with the media to providing factual information about its visits to the Sudan. The Commission also agreed that its working methods should be devised to suit each of its different tasks.

14. Thus, with regard to its first and second tasks, the Commission decided to examine existing reports on violations of international human rights and humanitarian law in Darfur, and to verify the veracity of those reports through its own findings, as well as to establish further facts. Although clearly it is not a judicial body, in classifying the facts according to international criminal law, the Commission adopted an approach proper to a judicial body. It therefore collected all material necessary for such a legal analysis.

15. The third task, that of identifying perpetrators, posed the greatest challenge. The Commission discussed the question of the standard of proof that it would apply in its investigations. In view of the limitations inherent in its powers, the Commission decided that it could not comply with the standards normally adopted

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[1] According to the language of article 28 (a) (ii) of the Statute of the International Criminal Court, which codifies customary international law.

by criminal courts (proof of facts beyond a reasonable doubt),[2] or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a prima facie case).[3] It concluded that the most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.[4] The Commission would obviously not make final judgements as to criminal guilt; rather, it would make an assessment of possible suspects[5] that would pave the way for future investigations, and possible indictments, by a prosecutor.

16. The Commission also agreed that, for the purpose of identifying the perpetrators, it would interview witnesses, officials and other persons occupying positions of authority, as well as persons in police custody or detained in prison; examine documents; and visit places — in particular, villages or camps for internally displaced persons, as well as mass grave sites — where reportedly crimes were perpetrated.

17. For the fulfilment of the fourth task the Commission deemed it necessary to make a preliminary assessment of the degree to which the Sudanese criminal justice system has been able and willing to prosecute and bring to trial alleged authors of

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[2] See for instance, rule 87 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia and article 66 (3) of the Statute of the International Criminal Court.

[3] Judge R. Sidhwa, of the International Tribunal for the Former Yugoslavia, in his *Review of the Indictment against Ivica Rajić* (decision of 29 August 1995, case No. IT-95-12) noted that under rule 47(A) of the Tribunal's Rules of Procedure and Evidence (whereby the Prosecutor can issue an indictment whenever satisfied " that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal"), a prima facie case existed when the Prosecutor had in his possession sufficient evidence providing reasonable grounds to believe that the suspect had committed the crime within the jurisdiction of the Tribunal. According to the distinguished Judge, "reasonable grounds point to such facts and circumstances as would justify a reasonable or ordinarily prudent man to believe that a suspect has committed a crime. To constitute reasonable grounds, facts must be such which are within the possession of the Prosecutor which raise a clear suspicion of the suspect being guilty of the crime ... It is sufficient that the Prosecutor has acted with caution, impartiality and diligence as a reasonably prudent prosecutor would under the circumstances to ascertain the truth of his suspicions. It is not necessary that he has double checked every possible piece of evidence, or investigated the crime personally, or instituted an enquiry into any special matter ... The evidence ... need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime. The expression 'sufficient evidence' is thus not synonymous with 'conclusive evidence' or 'evidence beyond reasonable doubt'" (in the International Tribunal for the Former Yugoslavia, *Judicial Reports 1994-1995*, vol. II, The Hague-London-Boston, Kluwer, 1999, at 1065). According to Judge G. Kirk McDonald' s decision on the *Review of the Indictment against Dario Kordić and others* (10 November 1995, case No. IT-95-14), by prima facie case one refers to a credible case which would, if not contradicted by the defence, be a sufficient basis to convict the accused on the charge laid out against him (ibid., p. 1123).

[4] This standard is even lower than that laid down in rule 40 bis (B) (ii) of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, which provides that, if "a reliable and consistent body of material which tends to show that the suspect may have committed a crime" is available, a judge of the Tribunal may order the transfer and provisional detention of a suspect.

[5] See rule 2 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, containing a definition of suspects ("Suspect: a person concerning whom the [Tribunals'] Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction").

international crimes perpetrated in Darfur, and then consider the various existing international mechanisms available. It is in the light of those evaluations that it has made recommendations on the most suitable measures.

4. Principal constraints under which the Commission has operated

18. There is no denying that while the various tasks assigned to the Commission are complex and unique, the Commission was called upon to discharge them under difficult conditions. First of all, it operated under serious time constraints. As pointed out above, given that the Security Council had decided that the Commission must act urgently, the Secretary-General requested that the Commission report to him within three months of its establishment. The fulfilment of its complex tasks, in particular those concerning the finding of serious violations and the identification of perpetrators, required the Commission to work intensely and under heavy time pressure.

19. Furthermore, both its fact-finding mission and its task of identifying perpetrators would have benefited from the assistance of a great number of investigators, lawyers, military analysts and forensic experts. Given the scale and magnitude of incidents relating to the conflict in Darfur, the establishment of facts and the collection of credible probative elements for the identification of suspected perpetrators are difficult tasks, which are not to be taken lightly. The Commission's budget did not allow for more than 13 such experts. The Commission nevertheless was able to gather a reliable and consistent body of material with respect to both the violations that occurred and the persons who might be suspected of bearing criminal responsibility for their perpetration. The Commission thus considers that it has been able to take a first step towards accountability.

5. Brief account of the Commission's visits to the Sudan

20. The Commission first visited the Sudan from 8 to 20 November 2004. It met with a number of high-level officials including the First Vice-President, the Minister of Justice, the Minister for Foreign Affairs, the Minister of the Interior, the Minister of Defence, the Minister of Federal Affairs, the Deputy Chief Justice, the Speaker of Parliament, the Deputy Head of the National Security and Intelligence Service, and members of the Rape Committees. It met with representatives of non-governmental organizations, political parties, and representatives in the Sudan of interested foreign Governments. In addition, it held meetings with the United Nations Advance Mission in the Sudan (UNAMIS) and other United Nations representatives in the country. The Commission also visited Kober prison (see annex II for a full list of meetings).

21. From 11 to 17 November 2004, the Commission visited Darfur. It divided itself into three teams, each focusing on one of the three States of Darfur. Each team met with the State Governor (*Wali*) and senior officials, visited camps of internally displaced persons, and spoke with witnesses and the tribal leaders. In addition, the Western Darfur team visited refugee camps in Chad and the Southern Darfur team visited the National Security Detention Centre in Nyala.

22. The Commission's investigation team was led by a chief investigator and included four investigators, two female investigators specializing in gender violence, four forensic experts and two military analysts. Members of the investigation team interviewed witnesses and officials in Khartoum and

accompanied the Commissioners on their field mission to the three Darfur States. The investigation team was then divided into three sub-teams which were deployed to Northern, Southern and Western Darfur.[6]

23. One Commission member and two Commission staff members, acting on behalf of the Commission, visited Eritrea on 25 and 26 November 2004. They met with representatives of two rebel groups: the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). They also met with former Sudanese officials now residing in Eritrea. Two members of the Commission, accompanied by two staff members, travelled to Addis Ababa from 30 November to 3 December 2004. The objectives were to obtain a thorough assessment from the African Union (AU) on the situation in Darfur, the African Mission in the Sudan (AMIS) and the inter-Sudanese talks in Abuja; and to discuss with the AU leadership ways and modalities for the Commission to strengthen its working cooperation. The delegation met with high-level officials of the African Union, including the newly appointed Special Representative for the Sudan. The delegation also had the opportunity to meet extensively with the Chairperson and some key members of the AU Integrated Task Force on Darfur.

24. A second visit to the Sudan took place from 9 to 16 January 2004. During that visit, the Commission focused on interviewing witnesses particularly in detention centres, and also met with some officials, members of civil society, and United Nations staff in Khartoum.

25. With the assistance of a team of five legal researchers and one political affairs officer, who were lead by the Executive Director, the Commission analysed the information provided. It reviewed and analysed published, public reports on Darfur, other reports that were brought to the attention of the Commission in response to its requests for information, and other types of information. In order to manage the more than 20,000 pages of material it received, the Commission developed a database in which it recorded bibliographic and evidentiary details. The analysis of incidents carried out by the research team was also recorded in the database as a way to facilitate swift access by the Commissioners and staff to resource material and source information.

6. Cooperation of the Sudanese authorities and the rebels

26. Security Council resolution 1564 (2004) was adopted under Chapter VII of the Charter of the United Nations. The Security Council had previously determined, in resolution 1556 (2004), twenty-first preambular paragraph, that the situation in the Sudan constituted a threat to international peace and security and to stability in the region under Article 39 of the Charter.

27. In paragraph 12 of the resolution, in which The Council requested the Secretary-General to establish an international commission of inquiry, it also called on all parties to cooperate fully with such a commission. The Commission considers that, by the very nature of the Commission and its mandate, both the Government of the Sudan and the rebels are under a bona fide obligation to cooperate with it in the discharge of its various functions. In any event, both the Government of the Sudan and the rebel groups have willingly accepted to cooperate with the Commission.

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[6] See annex IV for a detailed overview of the activities of the investigation team.

Criteria for appraising cooperation

28. The Commission set forth the following criteria for evaluating the degree of cooperation of both the Government and the rebels: (a) freedom of movement throughout the territory of the Sudan; (b) unhindered access to all places and establishments, and freedom to meet and interview representatives of governmental and local authorities, military authorities, community leaders, non-governmental organizations and other institutions, and any such person whose testimony is considered necessary for the fulfilment of its mandate; (c) free access to all sources of information, including documentary material and physical evidence; (d) appropriate security arrangements for the personnel and documents of the Commission; (e) protection of victims and witnesses and all those who appear before the Commission in connection with the inquiry and, in particular, a guarantee that no such person would, as a result of such an appearance, suffer harassment, threats, acts of intimidation, ill-treatment and reprisals; and (f) privileges, immunities and facilities necessary for the independent conduct of the inquiry. A letter was sent to the Government outlining these criteria.

Cooperation of the Government

29. As mentioned above, since its inception the Commission has engaged in a constant dialogue with the Government of the Sudan through meetings in Geneva and the Sudan, and through the work of its investigative team.

30. Generally speaking the attitude of the Government authorities towards the Commission has been cooperative. The authorities appointed an efficient liaison official in Khartoum, Abdelmonem Osman Taha, who organized all the meetings with senior Government officials requested by the Commission. In addition, the Minister of the Interior, as the President's representative on Darfur, appointed a committee presided over by Major General Magzoub and consisting of six senior officials from the Ministries of Defence and the Interior, as well as the National Security and Intelligence Service. The Commission met the Committee and received relevant documents about the Government's views on the conflict in Darfur.

31. Moreover, in his report dated 3 December 2004 (S/2004/947), the Secretary-General referred to a meeting of the Joint Implementation Mechanism held on 12 November 2004, during which the Minister of Justice provided the following assurances regarding the work of the Commission: (a) the Government would accept the report of the Commission, whatever its findings; (b) witnesses of incidents would not be subjected to maltreatment; and (c) following strict instruction from the President, no Sudanese officials would obstruct the Commission's investigations.

32. Furthermore, the Government did not impede the conduct of the Commission's work in the Sudan. In November 2004, a middle-level officer of the national security services refused to allow the Commission to have access to a number of persons being held in detention in Nyala (Southern Darfur). The Commission's Chairman requested the assistance of the liaison officer in Khartoum, and, subsequently, the Commission was able to interview the detainees without any hindrance. The Commission underwent a similar experience in Khartoum in January 2005, during its second visit to the Sudan. When some middle-level authorities refused to allow the Commission access to the National Security Detention Centre in Khartoum, the Chairman requested the immediate intervention of higher authorities and the Commission was eventually allowed access to the Centre.

33. However, one issue must be raised regarding the minutes of the meetings of the Security Committees at the locality and State levels. At a meeting with the First Vice-President, Ali Osman Mohammed Taha, held in Khartoum on 10 November 2004, the Commission asked to review the records of the various Government agencies in Darfur concerning decisions relating to the use of armed force against rebels and measures concerning the civilian population. The Commission promised to keep its scrutiny of such records strictly confidential. During the same meeting, the First Vice-President assured the Commission that it would be able to have access to and examine the minutes of the meetings of the Security Committees in the three States of Darfur and their various localities. However, when requested to produce those minutes, each of the Governors of the three States asserted that no such minutes existed and instead produced a selected list of final decisions on general issues. According to reliable sources, minutes and reports of such meetings are in fact produced by the Security Committees, and some of them relate to the operations conducted in Darfur to oppose the rebels or to deal with displaced persons. In spite of its requests, the Commission did not see copies of those documents.

34. An episode bearing on cooperation relates to another request by the Commission. At a meeting held on 9 November 2004 with the Minister of Defence, Bakri Hassan Saleh, and other senior Ministry of Defence officials, the Commission requested access to records of the deployment of military aircraft and helicopter gunships in Darfur since February 2003. Again, the Commission undertook to treat such records confidentially. The Minister of Defence agreed to comply with the request and promised that the Commission would obtain the records in Darfur from the relevant authorities. When the Commission did not obtain copies of those records in Darfur, it reiterated its request at a meeting with the Committee on Darfur on 20 November 2004. The Chairman of the Committee promised to provide those records and subsequently provided the Commission with an incomplete file, promising that it would be supplemented with further information. After further requests by the Commission, a number of records relating to the use of aircraft in Darfur from February 2003 to January 2005 were produced. However, a complete set of the records requests was never provided to the Commission.

35. The Commission also wishes to stress that there have been episodes indicative of pressure put by some regional or local authorities on prospective witnesses, or on witnesses already interviewed by the Commission. For instance, in the first week of November 2004, in El Fashir (Northern Darfur) a government official, reportedly the chief of the local office of the National Security and Intelligence Service, gave money to some internally displaced persons and urged them not to talk to the Commission. It was also reported to the Commission that the Sudanese authorities had deployed infiltrators posing as internally displaced persons into some camps such as Abu Shouk. In the same camp various eyewitnesses reported an episode that could be taken to amount to witness harassment. On 19 December 2004, around 12.30 in the afternoon, approximately 23 vehicles drove through the camp. The drivers stopped in the centre of the camp and started shouting: "We killed the *Torabora* [a common word used for indicating the rebels]. We killed your fathers, your brothers. You have to sleep forever." Women and children in the vicinity ran away, returning only after the soldiers had left the area. People in the camp were very worried about the safety of the entire camp.

36. In other instances, local authorities refused to allow the Commission's investigative team entry into a camp to interview witnesses. Those cases were however settled in due course, after negotiations with the authorities.

Cooperation of the rebels

37. The Commission was in contact only with the two main rebel movements, JEM and SLM/A, and generally considers that both groups cooperated with the Commission. The Commission met with representatives and members of the two groups on a number of occasions in the Sudan, as well as outside the country. It met with the leadership of SLM/A and JEM in Asmara, including the Secretary-General and military commander of SLM/A, Minnie Arkawi Minawi, the chief negotiator of SLM/A at the AU-sponsored talks, Sherif Harir, and the Chairman of JEM, Khalil Ibrahim, as well as other senior officials of both groups. Discussions were open and frank, and both organizations provided responses to queries presented by the Commission. In Darfur, the Commission met, on several occasions, with various representatives of the two rebel groups.

38. The Commission received a number of documents from both groups, which included information of a more general nature about Darfur and the Sudan, as well as detailed documentation on specific incidents including names of victims allegedly killed in attacks. However, the Commission was led to believe that the documentary information provided by the rebels would be more extensive and detailed than what in fact was obtained.

39. The Commission was never refused access to areas under the control of the rebels and was able to move freely in those areas. The rebel groups did not interfere with the Commission's investigations of reported incidents involving the rebels.

B. The historical and social background

1. The Sudan

40. In order to understand the current crisis in Darfur, it is important briefly to place the situation in Darfur within a broader context. The Sudan is the largest country in Africa, with a territory covering about 2.5 million square kilometres bordering Egypt in the north, the Red Sea, Eritrea and Ethiopia in the east, Uganda, Kenya and the Democratic Republic of the Congo in the south, and the Central African Republic, Chad and the Libyan Arab Jamahiriya in the west. The Sudan has an estimated population of 39 million inhabitants. About 32 per cent of the population are urban, 68 per cent rural, and about 7 per cent nomads. Islam is the predominant religion, particularly in the north, while Christianity and animist traditional religions are more prevalent in the south. The Sudan is a republic with a federal system of government. There are multiple levels of administration, with 26 States (*wilayaat*) subdivided into approximately 120 localities (*mahaliyaat*).

41. The elements that constitute national identity in the Sudan are complex. The population of the Sudan is made up of a multitude of tribes and its inhabitants speak more than 130 languages and dialects. An Islamic-African-Arab culture has emerged over the years and has become predominant in the north of the country. The Arabic language is now spoken throughout most of the country and constitutes a "lingua franca" for most Sudanese.

42. The Sudan is considered a least developed country, and ranks 139 in the 2004 UNDP Human Development Index.[7] There is no adequate national road grid that connects the country, and large parts of the Sudan rely on an agricultural and pastoral subsistence economy. However, commercial agriculture, industrial development as well as limited exploitation of natural resources, in particular following the discovery of oil in the central and southern part of the country, have developed in recent years. From the time of British colonization to date the focus of attention has been on both the central region where the Blue Nile and the White Nile meet, since development and construction are centred in Khartoum, and on the fertile region of El Jezzira where long-fibre cotton has been cultivated as the country's main crop. With the exception of those regions, the rest of the Sudan's wide territories have remained largely marginalized and neglected, including Darfur and other regions like Kordofan, the Nuba Mountains, the east of the Sudan and the south. Even the northern region between the border with Egypt and Khartoum has remained a desolate, desert area.

43. The Sudan gained independence from British-Egyptian rule on 1 January 1956. Since independence, the country has fluctuated between military regimes and democratic rule. During its 49 years of national rule, the Sudan has experienced 10 years of democracy in the periods 1956 to 1958, 1965 to 1969, and 1985 to 1989. During the remaining time, the Sudan has been ruled by military regimes, which came to power through coups d'état.

44. After two years of democratic governance following independence in 1956, General Ibrahim Abbud came to power through a coup in November 1958. Abbud supported the spread of the Arabic language and Islam, a movement which was met with resistance in the south. Unrest in the south increased in 1962, and in 1963 an armed rebellion emerged. Repression by the Government throughout the country increased, and in 1964 student protests in Khartoum led to general public disorder, which soon spread. Abbud resigned as Head of State and a transitional Government was appointed to serve under the provisional Constitution of 1956.

45. The transitional Government held elections in April and May 1965. A coalition Government headed by a leading politician of the Umma party, Mohmmed Ahmed Mahjub, was formed in June 1965. However, the Mahjub Government failed to agree on and implement effective reform policies, and in May 1969 a group of officers led by Colonel Gaafar Mohamed Al-Nimeiri took power. They adopted a one-party socialist ideology, which later changed to political Islam. In February 1972 Nimeiri signed the so-called Addis Ababa agreement with rebels from the south, which provided for a kind of autonomy for the south. This agreement made peace possible for the next 11 years. However, during the last years of his rule, General Nimeiri took several measures to strengthen his grip on power. Following the discovery of oil in the south, Nimeiri implemented measures to ensure the incorporation into the north of the oil-rich areas in the south, and cancelled the grant of autonomy for the south. Furthermore, in September 1983 under the influence of Hassan Al-Turabi, the then leader of the National Islamic Front and the Muslim Brotherhood, Nimeiri introduced Shariah rule. All of these steps led to strong reactions in the south, and eventually to the start of the second war with the south in 1983. Other key measures related to the laws governing land ownership and the local or tribal administration systems, as mentioned below.

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[7] See 2004 UNDP Human Development Report at http://www.undp.org.

46. Finally, in April 1985, after 16 years in power, the military Government of Nimeiri was overthrown in a military coup organized by army officers, and a Transitional Military Council was put in place under the leadership of General Abed Rahman Siwar Al-Dahab. Elections were organized in 1986, which led to the victory of the Umma party's leader, Sadiq Al-Mahdi, who became Prime Minister. Al-Mahdi's Government lasted less than four years. During this period it started to take some important measures, but was faced with serious challenges, including the continuing war in the south as well as drought and desertification.

47. The current President of the Sudan, General Omer Hassan Al-Bashir, assumed power in June 1989, following a military coup d'état organized in cooperation with the Muslim Brotherhood. Many Sudanese either were imprisoned or went into exile following the coup. Property was confiscated and political parties were banned. Al-Bashir, like Nimeiri, was heavily influenced by the main ideologue of the National Islamic Front, Hassan Al-Turabi. Beginning in 1989, the legal and judicial systems were significantly altered to fit the party's version of political Islam.

48. The ruling party's ideological base was modified in 1998 with the drafting and entry into force of a new Constitution on 1 July 1998 and the holding of elections in December the same year. The 1998 Constitution still reflects a strict ideology, provides for a federal system of government and guarantees some important basic rights. The elections of December 1998, which were boycotted by all major opposition parties, resulted in the election of President Al-Bashir for a further five-year term, his National Congress party assuming 340 of the 360 parliamentary seats. Turabi became the Speaker of Parliament. Party members continued to hold key positions and strong influence over the Government, army, security forces, judiciary, academic institutions and the media.

49. In 1999, an internal power struggle within the National Congress resulted in President Al-Bashir declaring a state of emergency, dissolving the Parliament, and suspending important provisions of the Constitution, including those relating to the structures of the local government in the States. In May 2000, Turabi led a split from the ruling National Congress, in effect establishing a new party called the Popular Congress. Many officials linked to Turabi were dismissed from Government and, in May 2001, Turabi himself was placed under house arrest and was later accused of organizing a coup d'état. He remains in detention today. At least 70 key members of the Popular Congress are currently detained without charge or trial, and a number have fled the Sudan to exile.

50. Since it erupted in 1983, the internal conflict between the north and the south has had a significant impact on the Sudan in many ways. It is the longest conflict in Africa, involving serious human rights abuses and humanitarian disasters. During the conflict, more than 2 million persons have died and 4.5 million persons have been forcibly displaced from their homes. However, following many years of war, and also as a result of heavy international pressure, the Government and the main rebel movement in the south, the Sudan People's Liberation Movement/Army, initiated peace talks in 2002. The Sudan peace process, under the auspices of the Intergovernmental Authority on Development (IGAD) and with the support of a troika (United States of America, United Kingdom of Great Britain and Northern Ireland and Norway), made significant progress. In July 2002, the parties signed the Machakos Protocol, in which they reached specific agreement on a broad framework, setting forth principles of governance, a transitional process and

structures of government, as well as on the right to self-determination for the people of southern Sudan. They agreed to continue talks on the outstanding issues of power-sharing, wealth-sharing, and a ceasefire. The IGAD-brokered peace process advanced substantially with the signing in Naivasha (Kenya) of a series of framework protocols in 2003 and 2004. On 31 December 2004, the parties signed two protocols on the implementation modalities and a permanent ceasefire, marking the end of the talks and negotiations in Naivasha. The process culminated on 9 January 2005 when, during an official ceremony, First Vice-President Taha and the SPLM/A Chairman, John Garang, signed the Comprehensive Peace Agreement, comprising all previously signed documents including the 31 December 2004 protocols. The Comprehensive Peace Agreement marks the end of two decades of civil war, calls for a six-month pre-interim period followed by a six-year interim period, which would end with a referendum on the right to self-determination in southern Sudan. The Comprehensive Peace Agreement provides for an immediate process leading to the formulation of an interim national constitution. A commission, composed of seven members from each side, will draft the Constitution which will then be submitted to a National Constitutional Review.

2. Darfur

51. The Darfur region in the western part of the Sudan is a geographically large area comprising approximately 250,000 square kilometres, with an estimated population of 6 million persons. Darfur borders on the Libyan Arab Jamahiriya, Chad and the Central African Republic. Since 1994 the region has been divided administratively into three States, Northern, Southern and Western Darfur. Like all other States in the Sudan, each of the three States in Darfur is governed by a Governor (*Wali*), appointed by the central Government in Khartoum, and supported by a local administration. Major urban centres include the capitals of the three Darfur States, Nyala in Southern Darfur, El Geneina in Western Darfur, and the capital of Northern Darfur, El Fashir, which is also the historical capital of the region. In addition, there are a few major towns spread out over the entire region which serve as local administrative and commercial centres. The majority of the population, however, lives in small villages and hamlets, often composed of only a few hundred families. The economy of the three Darfur States is based mainly on subsistence and limited industrial farming, as well as cattle herding.

52. Darfur was a sultanate that emerged in 1650 in the area of the Jebel Marra plateau and survived with some interruptions until it fell into British hands in 1917 and was incorporated into the Sudan proper.[8] The region is inhabited by tribal groups that can be classified in different ways. However, distinctions between these groups are not clear cut, and tend to sharpen when conflicts erupt. Nevertheless, individual allegiances are still heavily determined by tribal affiliations. The historic tribal structure, which dates back many centuries, is still in effect in Darfur although it was weakened by the introduction of local government during the time of Nimeiri's rule. Some of the tribes are predominantly agriculturalist and sedentary, living mainly from crop production during and following the rainy season from July to September. Some of the sedentary tribes also include cattle herders. Among the agriculturalists, one finds the Fur, the Barni, the Tama, the Jebel, the Aranga and the Masalit. Among the mainly sedentary cattle herders, one of the major groups is the

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[8] Mohamed, Suliman, *Darfu: New Perspective* (Cambridge, Cambridge Academic Press, 2004), p. 17 (Arabic edition).

southern Rizeigat, as well as the Zaghawa. In addition, a number of nomadic and semi-nomadic tribes can also be traditionally found in Darfur herding cattle and camels in Darfur, which include the Taaysha, the Habaneya, the Beni Helba, the Mohameed and others. It should be pointed out that all the tribes of Darfur share the same religion (Islam) and, while some of the tribes do possess their own language, Arabic is generally spoken.

53. The issue of land has for long been at the centre of politics in Darfur. Land ownership in Darfur has been traditionally communal. The traditional division of the land into homelands (*dar* = homeland), which are essentially areas to which individual tribes can be said to have a historical claim, is crucial in the local self-perception of the population. The traditional attribution of land to individual tribes in existence today dates back to the beginning of the twentieth century when the last sultan of Darfur, Sultan Ali Dinar, decreed this division which was generally accepted by all tribes. While this traditional division of land is not geographically demarcated in an exact manner, some general observations are possible. For instance, in the northern parts of Western Darfur and some western parts of Northern Darfur, the Zaghawa tribe predominates, and the area is also referred to as Dar Zaghawa — the homeland of the Zaghawa. In the area around and south of El Geneina, still in Western Darfur, the Masalit tribe has its homeland. While the name Darfur would mean the homeland of the Fur, the actual area where that tribe has its homeland is located in the centre of the Darfur region, around the Jebel Marra area, covering an area where the borders of the three States of Darfur meet, but also stretching further into all three States. The Rizeigat are mainly found in the southern parts of Southern Darfur. As noted, some tribes, essentially most of the nomadic tribes, do not possess land and have traditionally transited through land belonging to other tribes. Although this traditional division of land into homelands of different tribes has been in existence for many years, extensive intermarriage and socio-economic interconnectedness between the tribes have rendered a clear demarcation of both tribes and homelands less precise or accurate. Nevertheless, the self-perception of people as members of tribes and the social networks connected to the tribal structures remain a central feature of the demographics of Darfur.

54. Historically land was owned collectively by the members of the tribe and its use was determined by the tribal leadership. Tribal leaders had extensive powers to allocate parcels of land to the members of the tribe for dwelling, grazing, agriculture, or other forms of use. During the 1970s, however, the land laws were changed and individual ownership became possible. Although the land ownership was now attributed to the State, those who possessed land for at least one year could claim legal title. Those who did not have land had additional incentive to demonstrate loyalty to the Government in order to acquire it.

55. In recent years both ecological and demographic transformations have had an impact on inter-tribal relations. Darfur is part of the Great Sahara region, and while it has some agricultural areas, particularly around the Jebel Marra plateau, most of the region remains arid desert land. Drought and desertification had their impact in the 1970s and 1980s, and the fight for scarce resources became more intense. In particular, tensions arose between agriculturalists and cattle herders. Cattle herders in search of pasture and water often invaded the fields and orchards of the agriculturalists, and this led to bloody clashes as described below. Corridors that were agreed upon among the tribes to facilitate the movements of cattle for many

years were not respected. As fertile land became scarce, settled people's tolerance of the seasonal visitors diminished.[9]

56. Drought and desertification had its impact not only on Darfur but the entire region of the Sahara, which led to increased migration of nomadic groups from Chad, the Libyan Arab Jamahiriya and other States into the more fertile areas of Darfur. It is generally not disputed that, while this immigration was initially absorbed by the indigenous groups in Darfur, the increased influx combined with the tougher living conditions during the drought led to clashes and tensions between the newcomers and the locals.[10]

57. It was customary for the Darfur tribes to solve their differences through traditional law, especially the many disputes which occur between nomadic tribes and sedentary tribes like murders and incidents related to cattle stealing, which can develop into inter-tribal conflicts. Traditionally, disputes between members of tribes were settled peacefully by the respective tribal leaders, who would meet to reach a mutually acceptable solution. The State was then seen as a neutral mediator. But President Nimeiri introduced new structures of local administration and formally abolished the tribal system. The administrators of the new structures, who were appointed by the central Government, had executive and judicial powers. Although the tribes continued to informally resort to the tribal system, the system was significantly weakened. Local leaders were often chosen on the basis of their political loyalty to the regime, rather than their standing in the community. They were sometimes financed and strengthened particularly through the State's security apparatus. This meant that, when the State had to step in to resolve traditional conflicts, it was no longer seen as an impartial arbitrator.

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[9] According to J. D. Fage and W. Tordoff, *A History of Africa*, 4th ed. (London and New York, Routledge, 2002), "there can be little doubt that the lands of the agricultural peoples of the Sudan immediately south of the Sahara have in fact been subject for centuries to raids, infiltration, conquest and settlement by nomadic pastoralists coming from the desert." (pp. 63-64)

[10] As noted by A. Mosely Lesch, *The Sudan — Contested National Identities* (Bloomington and Indianapolis, Indiana University Press, 1998), "In the westernmost region of Dar Fur, many peoples resented control from Khartoum, and tension between Fur farmers and Rizaiqat Arab cattle herders escalated in 1984-95 as drought forced the nomads to encroach upon cultivated land. Fur were angry that the central government let Libyan troops deploy in northwest Dar Fur and permitted rebels from Chad to camp inside Dar Fur, where they joined with *Zaghawa* tribesmen to raid Fur villages. The SPLA claimed that 6,500 foreign troops were camped in Dar Fur by mid-1988, a number that grew as Libyan and the rebels prepared to overthrow the Ndjamena government in December 1999. The extent of destruction was indicated in a report in January 1989 that 57 villages had been burned in the Wadi Saleh agricultural district, where nearly 400 had died, 42,000 were displaced and 12,000 tons of food were destroyed. Further attacks by 3,000 *murahiliin* (Arab militias) on Jabal Marra in May 1989 burned 40 villages and left 80,000 homeless. Those government-armed *murahiliin* also attacked displaced persons from the south. In March 1987, in apparent revenge for the SPLA's killing of 150 Rizaiqat militiamen while they raided Dinka villages in western Bahr al-Ghazal, Rizaiqat *murahiliin* and Arab townspeople killed 1,000 destitute Dinka displaced persons in the largely Arab town of al-Da'ien. When police tried to shelter the Dinka women and children in the police station and on railway cars, the Rizaiqat torched the wagons and stormed the police station. The SPLA played no direct role in these conflicts, since the vast distance prevented the SPLA from aiding the Fur groups or protecting the displaced persons." (pp. 91-92).

58. Inter-tribal conflict was further aggravated by an increased access to weapons, through channels with Chad and the Libyan Arab Jamahiriya in particular. The latter aspired to have a friendly rule in Chad and the attempts to contain its ambitions in the region led several foreign Governments to pour arms into the region. In addition, several Chadian armed rebellions were launched from Darfur. The conflict in the south of the Sudan also had its impact on the region through easier access to weapons. As a consequence, each major tribe as well as some villages began to organize militias and village defence groups, essentially a group of armed men ready to defend and promote the interests of the tribe or the village.

59. The tribal clashes in the latter part of the 1980s were essentially between sedentary and nomadic tribes, in particular between the Fur and a number of Arab nomadic tribes, which had organized themselves in a sort of alliance named the Arab Gathering, while some members of the Fur tribe had created a group called the African Belt. The conflict was mediated by the Government and local tribal leaders in 1990, but tensions remained during the years that followed, and clashes between those tribes continued. This further led to resentment among some Darfurians against the Government of Al Bashir, which apparently was neither able nor willing effectively to address the unfolding situation in Darfur.

60. In the context of the present conflict in Darfur, and in the years preceding it the distinction between so-called African and Arab tribes has come to the forefront, and the tribal identity of individuals has increased in significance. The distinction stems, to a large extent, from the cumulative effects of marginalization, competing economic interests and, more recently, from the political polarization which has engulfed the region. The "Arab" and "African" distinction that was always more of a passive distinction in the past has now become the reason for standing on different sides of the political divide. The perception of one's self and of others plays a key role in this context.

3. The current conflict in Darfur

61. The roots of the present conflict in Darfur are complex. In addition to the tribal feuds resulting from desertification, the availability of modern weapons, and the other factors noted above, deep layers relating to identity, governance, and the emergence of armed rebel movements which enjoy popular support among certain tribes are playing a major role in shaping the current crisis.

62. It appears evident that the two rebel groups in Darfur, the Sudan Liberation Movement/Army and the Justice and Equality Movement began organizing themselves in the course of 2001 and 2002 in opposition to the Khartoum Government, which was perceived to be the main cause of the problems in Darfur. While only loosely connected, the two rebel groups cited similar reasons for the rebellion, including the socio-economic and political marginalization of Darfur and its people. In addition, the members of the rebel movements were drawn mainly from local village defence groups from particular tribes, which had been formed as a response to increases in attacks by other tribes. Both rebel groups had a clearly stated political agenda involving the entirety of the Sudan, demanding more equal participation in government by all groups and regions of the Sudan. Initially SLM/A, at that stage named the Darfur Liberation Front, came into existence with an agenda focused on the situation of the people of Darfur, and only later expanded its agenda to cover all of the Sudan. The Justice and Equality Movement based its

agenda on a type of manifesto — the "Black Book", published in 2001 — which essentially seeks to prove the disparities in the distribution of power and wealth by noting that Darfur and its populations, as well as some populations of other regions, have been consistently marginalized and not included in influential positions in the central Government in Khartoum. It is noteworthy that the two movements did not argue their case from a tribal point of view, but rather spoke on behalf of all Darfurians, and mainly directed their attacks at Government installations. It also appears that, with regard to policy formulation, the "New Sudan" policy of SPLM/A (Sudan People's Liberation Movement/Army) in the south had an impact on the SLM/A, while JEM seemed more influenced by trends of political Islam. Furthermore, it is possible that the fact that the peace negotiations between the Government and SPLM/A were advancing rapidly did in some way represent an example to be followed by other groups, since armed struggle would apparently lead to fruitful negotiations with the Government. It should also be recalled that, despite this broad policy base, the vast majority of the members of the two rebel movements came from essentially three tribes, namely, the Fur, the Masalit and the Zaghawa.

63. It is generally accepted that the rebel movements began their first military activities late in 2002 and at the beginning of 2003 through attacks mainly directed at local police offices, where the rebels would loot Government property and weaponry. The Government seemed initially to be taken aback by these attacks, but was apparently in no position to retaliate nor, it appears, did it initially consider the rebellion a serious military matter. Furthermore, for the Government the rebellion came at a particularly inopportune time, as it was in the process of intense peace negotiations with SPLM/A, and negotiations were advancing rapidly.

64. There are indications that the Government initially was concerned that Chad was involved in the crisis. President Al-Bashir travelled to El Fashir, the capital of Northern Darfur, in April 2003, to meet with the President of Chad, Idriss Deby, along with many local political and tribal leaders of Darfur, seeking to find a solution to the crisis. President Deby assured President Al-Bashir that the Government of Chad was not involved in the conflict.

65. In March and April 2003 the rebels attacked Government installations in Kutum, Tine and El Fashir, including the military section of the airport in El Fashir, where the rebels destroyed several military aircraft on the ground and killed many soldiers. An airforce commander was later captured by the rebels and was detained for about three months. Despite the efforts of the Government, he was released only following tribal mediation.

66. Most reports indicate that the Government was taken by surprise by the intensity of the attacks, as it was ill-prepared to confront such a rapid military onslaught. Furthermore, the looting by rebels of Government weaponry strengthened their position. An additional problem was the fact that the Government apparently was not in possession of sufficient military resources, as many of its forces were still located in the south, and those present in Darfur were located mainly in the major urban centres. Following initial attacks by the rebels against rural police posts, the Government decided to withdraw most police forces to urban centres. This meant that the Government did not have de facto control over the rural areas, which was where the rebels were based. The Government was faced with an additional challenge since the rank and file of the Sudanese armed forces was

largely composed of Darfurians, who were probably reluctant to fight "their own" people.

67. From available evidence and a variety of sources including the Government itself, it is apparent that faced with a military threat from two rebel movements, combined with a serious deficit in terms of military capabilities on the ground in Darfur, the Government called upon local tribes to assist in the fighting against the rebels. In this way, it exploited the existing tensions between different tribes.

68. In response to the Government's call, mostly Arab nomadic tribes without a traditional homeland and wishing to settle, given the encroaching desertification, responded to the call. They perhaps found in this an opportunity to be allotted land. One senior government official involved in the recruitment informed the Commission that tribal leaders were paid in terms of grants and gifts on the basis of their recruitment efforts and how many persons they provided. In addition, the Government paid some of the Popular Defence Forces staff their salaries through the tribal leaders, State budgets being used for these purposes. The Government did not accept recruits from all tribes. One Masalit leader told the Commission that his tribe was willing to provide approximately 1,000 persons to the Popular Defence Forces but, according to this source, the Government did not accept, perhaps on the assumption that the recruits could use this as an opportunity to acquire weapons and then turn against the Government. Some reports also indicate that foreigners, from Chad, the Libyan Arab Jamahiriya and other States, responded to the call and that the Government was more than willing to recruit them.

69. These new "recruits" were to become what the civilian population and others would refer to as the "Janjaweed", a traditional Darfurian term denoting an armed bandit or outlaw on a horse or camel. A more elaborate description of these actors will follow below.

70. Efforts aimed at finding a political solution to the conflict began as early as August 2003 when President Deby of Chad convened a meeting between representatives of the Government and rebel groups in Abeche. The talks, which JEM refused to join because it considered the Chadian mediation to be biased, led to the signing on 3 September 2003 of an agreement which envisaged a 45-day cessation of hostilities. Several rounds of talks were held thereafter under Chadian mediation. On 8 April 2004, the Government and SLM/A and JEM signed a humanitarian ceasefire agreement, and in N'Djamena on 28 May they signed an agreement on ceasefire modalities. Subsequent peace talks were held in Addis Ababa and in Abuja under the mediation of the African Union. On 9 November in Abuja, the Government, SLM/A and JEM signed two protocols, one on the improvement of the humanitarian situation and the second on the enhancement of the security situation in Darfur. In the context of further negotiations, the parties have not been able to overcome their differences and identify a comprehensive solution to the conflict.

71. Besides the political negotiations, the African Union also has been playing a leading role, through the AMIS, in seeking a solution to the conflict and in monitoring the cease-fire through the establishment of the AU Ceasefire Commission in Darfur, including the deployment of monitors. In spite of all of these efforts and the signing of several protocols, fighting and violations of the ceasefire between the rebels and the Government and its militias were still being reported in January 2005.

72. Regardless of the fighting between the rebels' on the one hand, and the Government and Janjaweed on the other, the most significant element of the conflict has been the attacks on civilians, which has led to the destruction and burning of entire villages, and the displacement of large parts of the civilian population.

Part One
The Commission's findings of violations of international human rights law and humanitarian law by the parties

I. Introduction

73. In fulfilling its mandate the Commission had to establish whether reported violations of international human rights law and humanitarian law in Darfur had in fact occurred. In addition, the Commission had to determine whether other, more recent violations had occurred. Before setting out the results of its fact-finding, the Commission must address a few general and preliminary issues.

II. The nature of the conflict in Darfur

74. The first such issue relates to the nature of the armed conflict raging in Darfur. This determination is particularly important with regard to the applicability of the relevant rules of international humanitarian law. The distinction is between international armed conflict, non-international or internal armed conflict, and domestic situations of tension or disturbances. The Geneva Conventions set out an elaborate framework of rules that are applicable to international armed conflict or "all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties".[11] Article 3 common to the Geneva Conventions and Additional Protocol II sets out the prerequisite of a non-international armed conflict. It follows from the above definition of an international conflict that a non-international conflict is a conflict without the involvement of two States. Modern international humanitarian law does not legally set out the notion of armed conflict. Additional Protocol II only gives a negative definition which, in addition, seems to narrow the scope of article 3 common to the Geneva Conventions.[12] The jurisprudence of the international criminal tribunals has explicitly elaborated on the notion: "an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[13] Internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature are generally excluded from the notion of armed conflict.[14]

75. The conflict in Darfur opposes the Government of the Sudan to at least two organized armed groups of rebels, namely the Sudan Liberation Movement/Army and the Justice and Equality Movement.[15] As noted above, the first two groups of

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[11] Common article 2 (1).

[12] Article 1 (2).

[13] See International Tribunal for the Former Yugoslavia Appeals Chamber, *Tadić, Interlocutory Appeal on Jurisdiction* (1995), para. 70.

[14] See Additional Protocol II, article 1 (2) and the Rome Statute, article 8 (2) (d) and (f).

[15] A third rebel group recently emerged, namely the National Movement for Reform and Development (NMRD). According to a report of the United Nations Secretary-General of 3 December 2004, on 2, 3, and 26 November 2004 NMRD reportedly attacked four villages around the Kulbus area. It also clashed with armed militias in the Jebel Marra area (see S/2004/947, para. 10 (f).

insurgents took up arms against the central authorities in or around 2002. However, the scale of rebel attacks increased noticeably in February 2003. The rebels exercise de facto control over some areas of Darfur. The conflict therefore does not merely amount to a situation of internal disturbances and tensions, riots, or isolated and sporadic acts of violence. Rather, the requirements of (a) existence of organized armed groups fighting against the central authorities, (b) control by rebels over part of the territory and (c) protracted fighting, for this situation to be considered an internal armed conflict under article 3 common to the Geneva Conventions, are met.

76. All the parties to the conflict — the Government of the Sudan, SLA and JEM — have recognized that this is an internal armed conflict. Among other things, in 2004 the two rebel groups and the Government of the Sudan entered into a number of international agreements, *inter se*, in which they invoke or rely upon the Geneva Conventions.

III. Categories of persons or groups participating in the armed conflict

77. This section will briefly review the various groups taking an active part in the armed conflict in Darfur. On the side of the Government, the various elements of the Sudan People's Armed Forces have played a key role in the armed conflict and therefore are described below. In addition, according to the Commission's findings, the National Security and Intelligence Service has a central role and is responsible for the design, planning and implementation of policies associated with the conflict. The Service is often referred to as the de facto State power and its influence appears to reach the highest levels of authority. Its mandate and structure are described below. The role of the Government-supported militia, commonly referred to as "Janjaweed", is also set out below. Finally, the structure and role of the main rebel groups referred to above are explained here in further detail.

A. Government armed forces

1. General features

78. The Sudanese armed force is a conventional armed force with a mandate to protect and to maintain internal security.[16] It carries out its mandate through an army, including Popular Defence Force militia and Borders Intelligence, as well as an air force and navy. According to information received by the Commission, currently the army numbers approximately 200,000 in strength, although its logistical capacity was designed for an army of 60,000. Support, in particular air support, therefore goes primarily to priority areas and is redeployed only after those areas have calmed down. The central command and control of armed forces operations are therefore imperative.

2. Structure

79. The Commander-in-Chief of the armed forces is the President, although for operational purposes he exercises this power through the Minister of Defence. The

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[16] Constitution of the Sudan, part VII, article 122.

Minister appoints a Commander of the Armed Forces and Chief of General Staff who, together with five Deputy Chiefs of Staff (including Operations, Logistics, Administration, Training and Morale), form the Committee of the Joint Chiefs of Staff or command group.

3. Military Intelligence

80. While Military Intelligence was once a part of the operations branch within the armed forces, it now forms an independent branch with its own administration and command. Military Intelligence has the power to arrest, detain and interrogate. With regard to communication and reporting, the Military Intelligence branch passes information through the operational chain, as well as directly to the Presidency, through the Chief of the Military Intelligence branch.

4. Popular Defence Forces

81. For operational purposes, the Sudanese armed forces can be supplemented by the mobilization of civilians or reservists into the Popular Defence Forces (PDF). The mandate of PDF derives from the Popular Defence Forces Act of 1989, which defines PDF as "paramilitary forces" made up of Sudanese citizens who meet certain criteria. Article 6 of the Act states that the functions of PDF are to assist the People's Armed Forces and other regular forces whenever needed, contribute to the defence of the nation and help to deal with crises and public disasters and perform any other task entrusted to them by the Commander-in-Chief himself or pursuant to a recommendation of the Council. According to the Act, a body known as the Council of the Popular Defence Forces advises the Commander-in-Chief on matters affecting the Popular Defence Forces, including areas in which PDF should be established, military training and education for PDF members, and other issues relating to the duties and activities of the Popular Defence Forces.

82. According to information gathered by the Commission, local government officials are asked by army headquarters to mobilize and recruit PDF forces through tribal leaders and sheikhs. The *Wali* is responsible for mobilization in each State because he is expected to be familiar with the local tribal leaders. As one tribal leader explained to the Commission, "in July 2003 the State called on tribal leaders for help. We called on our people to join PDF. They responded by joining, and started taking orders from the Government as part of the state military apparatus".

83. The Popular Defence Forces provides arms, uniforms and training to those mobilized, who are then integrated into the regular army for operations. At that point, the recruits come under regular army command and normally wear the same uniform as the unit they are fighting with. One senior commander explained the recruitment and training of PDF soldiers as follows:

> Training is done through central barracks and local barracks in each state. A person comes forward to volunteer. We first determine whether training is needed or not. We then do a security check and a medical check. We compose a list and give it to the military. This is done at both levels — Khartoum and state or local level. We give basic training (for example, on the use of weapons, discipline, ...) which can take two weeks or so, depending on the individual.

> A person may come with a horse or camel — we may send them into military operations on their camel or horse. [...] Recruits are given weapons and weapons are retrieved again at the end of training.

84. According to another senior commander, most of the PDF recruits come "well-versed in firearms and are tough and fit" but "need training in discipline". He noted that uniforms, weapons and ammunition were not always returned by recruits following demobilization, and that weapons and ammunition would at times be distributed through tribal leaders in order to ensure that they are returned on demobilization.

5. Borders Intelligence

85. The armed forces also include an operational unit called Borders Intelligence, the primary role of which is to gather information. Members of this unit are recruited from the local population. They are deployed to their areas of origin, according to their experience in the area, knowledge of the tribes, and ability to differentiate between people of different tribal and national origins based on local knowledge. Borders Intelligence guards are under the direct control of the Military Intelligence officers in the particular division where they are deployed and otherwise fall under the regular chain of command for the armed forces.

86. While initially Borders Intelligence officers were recruited in relation to the conflict in southern Sudan, the Government began recruiting them during the early stages of the armed conflict in Darfur late in 2002 and early in 2003. Some consider that this was done as a cover to recruit Janjaweed. According to a senior armed forces commander, Borders Intelligence soldiers are recruited directly into the army in the same way as regular soldiers. An advertisement is made through media channels for volunteers who meet certain criteria, in particular with regard to age, citizenship and fitness. Approximately 3,000 Borders Intelligence soldiers have been recruited in this way and deployed in Darfur.

6. Reporting and command structure

87. Planning for all military operations is done in Khartoum by the Committee of the Joint Chiefs of Staff. Orders in relation to a particular operation are passed from the Committee to the Director of Operations, who gives them to the Area Commander. The Area Commander then gives the orders to the Divisional Commander, who transmits them to the Brigade Commander for implementation.

88. With regard to reporting, information flows from battalion level to the Brigade Commander, to the Divisional Commander, to the Area Commander, to the Director of Operations, and finally to the Deputy Chief of Staff and Command Group. The Command Group reports to the Chief of Staff who reports, if necessary, to the Minister of Defence and finally to the Presidency. Within the army, reporting and all other communications take place up and down the chain of command as with most conventional armed forces.

7. National Security and Intelligence Service

89. National Security forces are regular forces whose mission is to oversee the internal and external security of the Sudan, monitor relevant events, analyse the

significance and dangers of the same, and recommend protection measures.[17] According to information received by the Commission, the National Security and Intelligence Service is one of the most powerful organs in the Sudan. Its derives from the National Security Forces Act of 1999, as amended in 2001, which states that there shall be an internal security organ in charge of internal security, and a Sudanese intelligence organ in charge of external security.[18]

90. National security forces act under the general supervision of the President.[19] The direct responsibility of the organ is assumed by the Director-General[20] who is appointed by the President.[21] The Director-General is responsible to the President for the execution of his functions and the overall performance of the organ.[22]

91. According to the Act, a body known as the National Security Council is to be established to oversee the implementation of the security plan of the country; to supervise the progress of security work; to coordinate between security organs; to follow up on the implementation of security policies and programmes; to approve regulations related to the organization of work; and to constitute a technical committee from the organs forming the Council in order to assist in the progress of work.[23] The National Security Council is to be constituted of the President, the President's adviser on security affairs, the Minister of Defence, the Minister of Foreign Relations, the Minister of Internal Affairs, the Minister of Justice, the Director of the Internal Security Organ, and the Director of the Sudanese Intelligence Organ.[24]

92. The Act also provides for the establishment of the High Technical Security Committee which has a mandate to study the security plans presented by the States and the competent organs, submit the plans to the Council for approval, follow up on implementation, and receive reports with respect thereto. The Committee is to coordinate the business of security committees in the various States, with regard to the security plans set out by the Council.[25]

93. Major General Sallah Abdallah (also known as Sallah Gosh), the Director-General of the National Security and Intelligence Service, informed the Commission of a decision to create one unified service, comprising both the internal and external intelligence. This service was formed in February 2004 and is known as the National Security and Intelligence Service. The Director-General told the Commission that he reports at least every second day to the President and/or First Vice-President. While he cooperates with other organs of the Government, he is accountable directly to the President.

94. With regard to the Darfur crisis, the Director-General stated that the National Security and Intelligence Service would gather information and report to the President about the situation. Depending on the nature of the issue, it would also report to the Ministry of Defence, Ministry of the Interior, Ministry of Foreign

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[17] Constitution of the Sudan, part VII, article 124.

[18] National Security Act, articles 5(1) and 5(2).

[19] Ibid., article 5(3).

[20] Ibid., article 5(4).

[21] Ibid., article 10(1).

[22] Ibid., article 10(3).

[23] Ibid., article 35.

[24] Ibid., article 34(1).

[25] Ibid., articles 38 and 39.

Affairs or Ministry of Humanitarian Affairs. Based on the information received, the President would then instruct the Cabinet. He further stated that the President formed a coordinating Committee in response to the crisis, which was headed by the Minister for Federal Affairs and included the Minister of Defence, Minister of the Interior, Director of Intelligence, Minister for Foreign Affairs and Minister of Humanitarian Affairs. However, according to the Director-General the Committee has not met in the last 12 months. Instead, the relevant ministries or organs have dealt individually or bilaterally with the matter under their competence.

95. As to the hierarchy within the National Security and Intelligence Service, the Director-General informed the Commission that he has a Deputy, with whom he shares his activities and functions, as well as four Directors. The Service has a desk specifically to address the situation in Darfur, which receives all information regarding the area, including external public information. This unit is responsible for producing and analysing intelligence. Every unit reports up the chain of command and ultimately every action is reported to the Director-General.

96. The Commission noted that the National Security Force Act, as amended in 2001, gives the security forces wide-reaching powers, including the power to detain without charge or access to a judge for up to nine months. In Khartoum, the Commission interviewed detainees held incommunicado by the security forces in "ghost houses" under abhorrent conditions. In some cases, torture, beatings and threats were used during interrogations and so as to extract confessions. Some of the detainees had been held for 11 months without charge, access to a lawyer or communication with family.

97. The security forces collect information on all aspects of life in the three States of Darfur. This information is disseminated to the relevant ministries for appropriate action. The Director-General confirmed that this information or intelligence may relate to matters such as the presence of rebels and whether or not they have arms. The military may use this information to make operational decisions. While the National Security and Intelligence Service does not give orders to the military, it provides it with information which is used as a basis for operational planning.

B. Government supported and/or controlled militias: the Janjaweed

98. A major question relates to the militias in Darfur, often referred to as Janjaweed, *fursan* (horsemen, knights), or mujahideen. The term Janjaweed, in particular, has been widely used by victims of attacks to describe their attackers. The term has consequently also been used by many international organizations and the media in their reports on the situation in Darfur, and was used by the Security Council in resolution 1564 (2004). Victims of attacks have indicated that the Janjaweed were acting with and on behalf of Government forces. In contrast, senior Sudanese State authorities, in Khartoum and in the three Darfur States, indicated to the Commission that any violations committed by the Janjaweed have no relationship to State actors. Given the allegedly central role played by the Janjaweed in the acts being investigated by the Commission and given the discrepancy in the understanding of the identity of the Janjaweed and their alleged link with the State, it was essential for the Commission to clarify the character and role of those actors to whom the term is being applied.

99. This section clarifies the concept of Janjaweed and the implications for the determination of international criminal responsibility. As explained below, the Commission has gathered very substantial material which it considers substantiates use of the term Janjaweed, in the limited context of the Commission's mandate, as a generic term to describe Arab militia acting, under the authority, with the support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions. For this reason, the Commission has chosen to use the term Janjaweed throughout this report, and also because it reflects the language used by the Security Council in the various resolutions concerning Darfur and, most of all, because it is constantly referred to by victims.

1. Emergence of the term Janjaweed

100. In Darfur the term "Janjaweed" has been used in the past to describe bandits who prey on rural populations through, among other things, the stealing of cattle and highway robbery. The word Janjaweed is an Arabic colloquialism from the region, and generally means "a man (a devil) on a horse". The term was used in the tribal conflicts of the 1990s to specifically denote militias from mainly Arab tribes which would attack and destroy the villages of sedentary tribes.

101. The fact that the Janjaweed are described as Arab militias does not imply that all Arabs are fighting on the side of the Janjaweed. In fact, the Commission found that many Arabs in Darfur are opposed to the Janjaweed, and some Arabs are fighting with the rebels, such as certain Arab commanders and their men from the Misseriya and Rizeigat tribes.[26] At the same time, many non-Arabs are supporting the Government and serving in its army. Thus, the term Janjaweed used by victims in Darfur certainly does not mean Arabs in general, but rather Arab militias raiding their villages and committing other violations.

102. The Commission found that, when faced with the rebellion in Darfur launched by two rebel movements early in 2003, the Government called on a number of Arab tribes to assist in the fight. Some tribal leaders with relationships with both local and central Government officials played a key role in recruiting and organizing militia members and liaising with Government officials. One senior Government official, at provincial level, described how an initial Government recruitment of fighting men drew also upon Arab outlaws and, as other reports have described, the recruitment of convicted felons. The Commission also received credible evidence that the ranks of the Janjaweed include fighters from neighbouring countries, primarily Chad and the Libyan Arab Jamahiriya.

2. Uses of the term in the context of current events in Darfur

103. Victims of attacks consistently refer to their attackers as Janjaweed, most often attacking with the support of Government forces. When asked to provide further details, victims report that the Janjaweed attackers are from Arab tribes and, in most instances, attacked on horseback or on camels and were armed with automatic weapons of various types.

104. With the exception of these two precisions, it is probably impossible to define the Janjaweed, as the term is used in Darfur today, as a homogenous entity. In

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[26] The Commission was informed of certain Rizeigat in Ed Daien, Southern Darfur, who had refused to answer the call to join other Arab tribes in the fight and instead joined SLA.

particular, actors to whom it has been applied can usually also be described with other terminology. For example, the Commission found that on numerous occasions the term Janjaweed was used, by victims and members of the authorities, to describe particular men they had named as leaders of attacks on villages in which civilians were killed and rapes were committed. The Commission was later able to confirm that these men were in fact members of PDF. Separately, the Commission was informed that a senior member of the local authorities had described one man as a local Janjaweed leader. The man was similarly identified by a victim of an attack as being a Janjaweed leader who had conducted attacks in which civilians were killed. Later, the Commission obtained an official Government letter in which Darfur provincial authorities referred to the same man as being a member of the *fursan*. Finally, the man himself showed the Commission evidence that he was a member of PDF. By way of a further example, the Commission confirmed that PDF forces in one State conduct their attacks on horseback and on camels in a specific deployment configuration and using particular types of weapons. Many victims of attacks in the same area, who identified their attackers as Janjaweed, described for the Commission attackers wearing the same uniforms, using the same deployment during the attack and using the same weapons as those employed by local PDF forces. In a further instance, one victim was asked by the Commission to distinguish between Janjaweed, army and police who had allegedly attacked his village. He responded by saying that for himself and other victims they were all the same.

105. These are a few examples, among multiple testimonies and material evidence, confirming for the Commission that, in practice, the term Janjaweed is being used interchangeably with other terms used to describe militia forces working with the Government. Where victims describe their attackers as Janjaweed, those persons might be from a tribal Arab militia, from the Popular Defence Forces or from some other entity, as described below.

3. Organization and structure of the Janjaweed

106. The Janjaweed are not organized in one single coherent structure, and the Commission identified three main categories of Janjaweed actor, determined according to their type of affiliation with the Government of the Sudan. The first category includes militias which are only loosely affiliated with the Government and which have received weapons and other supplies from the State. These militias are thought to operate primarily under a tribal management structure.[27] They are thought to undertake attacks at the request of State authorities, but are suspected by the Commission of sometimes also acting on their own initiative to undertake small-scale actions to loot property for personal gain.

107. A second category includes militias which are organized in paramilitary structures and in parallel to regular forces, including groups known as "the strike force", the mujahideen or the *fursan* (the horsemen). Some of these may be headed by officers in the regular army while also controlled by senior tribal leaders. While militias in this category are thought to operate within a defined command structure they do not have any legal basis.

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[27] For instance some Rizeigat witnesses in Western Darfur said they have been attacked near Kulbus by "Janjaweed Zaghawa". In this instance, it is clear that they refer to the Zaghawa tribal militias, who probably also attack on horses and camels.

108. A third category of militia includes members of the Popular Defence Forces[28] and Borders Intelligence[29] which have a legislative basis under Sudanese law. PDF fight alongside the regular armed forces.

109. There are links between all three categories. For example, the Commission has received independent testimony that PDF has supplied uniforms, weapons, ammunition and payments to Arab tribal militia from the first category. The leaders of these tribes meet regularly with the PDF civilian coordinator, who takes their concerns to the Security Committee of the locality.

110. The Commission has gathered substantial material attesting to the participation of militia from all three categories in committing violations of international human rights and humanitarian law. The Commission has determined, further, that attackers from all three categories have been identified by victims and other witnesses as Janjaweed.

4. Links between the militias and the State

111. The Commission has established that clear links exist between the State and militias from all three categories. The close relationship between the militias and PDF, a State institution established by law, demonstrates the strong link between the militias and the State as a whole. In addition, militias from all three categories have received weapons and regular supplies of ammunition, which have been distributed to the militias by the army, by senior civilian authorities at the locality level or, in some instances, by PDF to the other militias.

112. The Popular Defence Forces take their orders from the army and conduct their attacks on villages under the direct leadership of an army officer with the rank of Captain or Lieutenant. Testimonies of victims consistently depict close coordination in raids between Government armed forces and militia men they have described as Janjaweed and the Commission has very substantial material attesting to the participation of all categories of militia in attacks on villages in coordination with attacks or surveillance by Sudanese military aircraft. Numerous sources have reported that the Government of the Sudan aircraft have been used to supply the Janjaweed with arms.

113. Members of PDF receive a monthly salary from the State which is paid through the army. The Commission has reports of the tribal militia members, or their leaders, receiving payments for their attacks and one senior Government official involved in the recruitment of militia informed the Commission that tribal leaders were paid in terms of grants and gifts according to the success of their recruitment efforts. In addition, the Commission has substantial testimony that this category of militia has the tacit agreement of the State authorities to loot any property they find and to gain compensation for their attacks in this way. A consistent feature of attacks is the systematic looting of the possessions of villagers, including cash,

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[28] President Al-Bashir also confirmed that, to rein in the Janjaweed, they were incorporated in "other areas", such as the armed forces and the police: see interview on CNN on 31 August 2004, transcript at http://edition.cnn.com/2004/WORLD/africa/08/31/amanpour.bashir/index.html.

[29] The existence of the Border Guard is supported by many witness testimonies. In an interview with the Commission, General El-Fadil, Deputy Director of Military Intelligence, said that his department was responsible for recruiting for the Border Guard, and made a distinction between them and PDF

personal valuable items and, above all, livestock. Indeed, all of these militias operate with almost complete impunity for attacks on villages and related human rights violations. For example, the Commission has substantial testimony indicating that police officers in one locality received orders not to register or investigate complaints made by victims against Janjaweed.

114. According to a report of the Secretary-General, of 30 August 2004 (S/2004/703), "the Government also accepted that the militias under its influence were not limited to those previously incorporated into the Popular Defence Forces, but also included militias that were outside and later linked with or mobilized to join those forces. This means that the commitment to disarm refers both to the Popular Defence Forces and to militias that have operated in association with them".

115. Confidential documents made available to the Commission further support the above conclusions on links between the militias and the Government, and identify some individuals within the governmental structure who would have had a role in the recruitment of the militias.

116. The Commission does not have exact figures of the numbers of active Janjaweed, but most sources indicate that in each of Darfur's three States there is at least one large Janjaweed group as well as several smaller ones. One report identified at least 16 Janjaweed camps still active throughout Darfur, with the names of Janjaweed commanders. According to information obtained by the Commission, Misteria, in Northern Darfur, is one Janjaweed camp which continues to be used today and which incorporates a militia known as the Border Guards. It was set up as a base for Janjaweed from which they receive training, weapons, ammunition and can eventually be recruited into the PDF structure, into the police, or into the army. The Commission received evidence that civilians have been abducted by leaders of this camp and detained within the camp, where they were tortured and used for labour. Those civilians were taken out of the camp and hidden during three prearranged monitoring visits by AU forces. In the first half of 2004 the Misteria camp was populated by approximately 7,000 Janjaweed. By the end of 2004 most of those men had been registered as PDF or police and army regular forces. An army officer with the rank of Colonel was stationed in the camp throughout the year and was responsible for training, ammunition stores and paying salaries to the Janjaweed. Two military helicopters visited the camp roughly once a month bringing additional weapons and ammunition. On at least one occasion the camp was visited by an army brigadier.

5. The position of the Government

117. Especially since the international community became aware of the impact of the Janjaweed actions, responses of the Government of the Sudan to the use of the term seem to have been aimed at denying the existence of any links between the State and the Janjaweed; and most officials routinely attribute actions of the Janjaweed to "armed bandits", "uncontrolled elements", or even SLA and JEM. The Government position has nevertheless been inconsistent, different officials, both at national and Darfur levels, giving different accounts of the status of the Janjaweed and their links with the State.

118. The Minister of Defence during a press conference on 28 January 2004 invited the media to differentiate between the rebels, the Janjaweed, the Popular Defence Forces and tribal militias, such as the militias of the Fur tribe, and the Nahayein of

the Zaghawa. He said PDF are volunteers who aid the armed forces but the Janjaweed are "gangs of armed bandits" with which the Government has no relations whatsoever.[30] President Al-Bashir intended his pledge on 19 June 2004 to disarm the Janjaweed to apply only to the bandits, not the Popular Defence Forces, popular police or other tribesmen armed by the State to fight the rebels.[31]

119. Contrasting with the above, some official statements confirm the relationship between the Government and the militias. In a widely publicized comment addressed to the citizens of Kulbus, a town the rebels had failed to overrun in December 2003, the President said: "Our priority from now on is to eliminate the rebellion, and any outlaw element is our target … We will use the army, the police, the mujahideen, the horsemen to get rid of the rebellion".[32] The Minister of Justice told the ad hoc delegation of the Committee on Development and Cooperation of the European Parliament during its visit in February 2004 that "the Government made a sort of relationship with the Janjaweed. Now the Janjaweed abuse it. I am sure that the Government is regretting very much any sort of commitments between them and the Government. We now treat them as outlaws. The devastation they are doing cannot be tolerated at all".[33] On 24 April 2004, the Foreign Minister stated: "The Government may have turned a blind eye toward the militias. This is true. Because those militias are targeting the rebellion."[34] The Commission has formally requested the Minister on three occasions to provide it with the above statement or any other statement related to the militias, but has not received it.

120. Despite Government statements regretting the actions of the Janjaweed, the various militias' attacks on villages have continued throughout 2004, with continued Government support.

6. The question of legal responsibility for acts committed by the Janjaweed

121. The Janjaweed to whom most victims refer in the current conflict are Arab militias that raid the villages of those victims, mounted on horses or camels, and kill, loot, burn and rape. Those militias frequently operate with, or are supported by, the Government, as evidenced both by consistent witness testimonies describing Government forces' support during attacks, the clear patterns in attacks conducted across Darfur over a period of a year, and by the material gathered by the Commission concerning the recruitment, arming and training of militias by the Government. Some militias may, as the Government alleges, sometimes act independently of the Government and take advantage of the general climate of chaos and impunity to attack, loot, burn, destroy, rape and kill.

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[30] "The Minister of Defence meets the media …", *Al-Adwa*, 29 December 2003 (in Arabic).

[31] See *Akkbar al-Yoom* and other major newspapers of 23 June 2004. President Al-Bashir said he used the term "Janjaweed" only because "malevolent powers" were employing it to "slander" the Government; see the contradiction with the report of the Secretary-General of 30 August 2004 mentioned above, where the Government expresses its commitment to disarm PDF.

[32] "Sudanese president says war against outlaws is government priority", Associated Press, 31 December 2003.

[33] Report by the ad hoc delegation of the Committee on Development and Cooperation of the European Parliament of its visit in February 2004.

[34] "Sudan Minister Hails U.N. Rights Vote", Associated Press, Khartoum, *The Guardian* (London), 24 April 2004.

122. A major legal question arises with regard to the militias referred to above: who, in addition to the individual perpetrators, is criminally responsible for crimes allegedly committed by Janjaweed?

123. When militias attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in *Tadić (Appeal)*, at paragraphs 98 to 145. Thus they are acting as de facto State officials of the Government of the Sudan. It follows that, if it may be proved that all the requisite elements of effective control were fulfilled in each individual case, responsibility for their crimes is incurred not only by the individual perpetrators but also by the relevant officials of the army for ordering or planning those crimes, or for failing to prevent or repress them, under the notion of superior responsibility.

124. When militias are incorporated in the Popular Defence Forces and wear uniforms, they acquire, from the viewpoint of international law, the status of organs of the Sudan. Their actions and their crimes could be legally attributed to the Government. Hence, as in the preceding class, any crime committed by them involved not only the criminal liability of the perpetrator, but also the responsibility of their superior authorities of the Sudan if they ordered or planned those crimes or failed to prevent or repress such crimes (superior responsibility).

125. On the basis of its investigations, the Commission is confident that the large majority of attacks on villages conducted by the militia have been undertaken with the acquiescence of State officials. The Commission considers that in some limited instances militias have sometimes taken action outside of the direct control of the Government of the Sudan and without receiving orders from State officials to conduct such acts. In these circumstances, only individual perpetrators of crimes bear responsibility for such crimes. However, whenever it can be proved that it was the Government that instigated those militias to attack certain tribes, or that the Government provided them with weapons and financial and logistical support, it may be held that (a) the Government incurs international responsibility (vis-à-vis all other States of the international community) for any violation of international human rights law committed by the militias, and (b) the relevant officials in the Government may be held criminally accountable, depending on the specific circumstances of each case, for instigating or for aiding and abetting the violations of humanitarian law committed by militias.

126. The Commission wishes to emphasize that, if it is established that the Government used the militias as a "tactic of war", even in instances where the Janjaweed may have acted without evidence of Government support, Government officials may incur criminal responsibility for joint criminal enterprise to engage in indiscriminate attacks against civilians and murder of civilians. Criminal responsibility may arise because, although the Government may have intended to kill rebels and destroy villages for counter-insurgency purposes, it was foreseeable, especially considering the history of conflicts between the tribes and the record of criminality of the Janjaweed, that giving them authorization, or encouragement, to attack their long-term enemies, and creating a climate of total impunity, would lead to the perpetration of serious crimes. The Government of the Sudan willingly took that risk.

C. Rebel movement groups

1. The Sudan Liberation Movement/Army

127. The Sudan Liberation Movement/Army is one of the two main rebel organizations in Darfur. By all accounts, it appears to be the largest in terms of membership and geographical activity. It is composed mainly of Zaghawa, Fur and Masalit, as well as some members of Arab tribes. SLM/A initially called itself the Darfur Liberation Front, and at the time was defending a secessionist agenda for Darfur. In a statement released on 14 March 2003, the Darfur Liberation Front changed its name to the Sudan Liberation Movement and the Sudan Liberation Army, and called for a "united democratic Sudan" and for separation between State and religion.

128. SLM/A claims that all post-independence Governments of the Sudan have pursued policies of marginalization, racial discrimination, exclusion, exploitation and divisiveness, which in Darfur have disrupted the peaceful coexistence between the region's African and Arab communities. As indicated in its policy statement released in March 2003, "the SLM/A is a national movement that aims along with other like-minded political groups to address and solve the fundamental problems of all of the Sudan. The objective of SLM/A is to create a united democratic Sudan on a new basis of equality, complete restructuring and devolution of power, even development, cultural and political pluralism and moral and material prosperity for all Sudanese".[35] It called upon tribes of "Arab background" to join its struggle for democracy. On various occasions it has stated that it was seeking an equitable share for Darfur in the country's distribution of wealth and political power.

129. SLM/A emphasizes that it has a national agenda and does not argue its case from a tribal perspective, and underlines that its cause is directed against the Khartoum Government, and not the Arab tribes in Darfur: "The Arab tribes and groups are an integral and indivisible component of Darfur social fabric that have been equally marginalized and deprived of their rights to development and genuine political participation. SLM/A firmly opposes and struggles against the Khartoum Government's policies of using some Arab tribes and organizations such as the Arab Alliance and Quresh to achieve its hegemonic devices that are detrimental both to Arabs and non-Arabs."[36]

130. In addition, it should also be noted that SLM/A is part of the Sudanese opposition umbrella group, the National Democratic Alliance (NDA), which also includes the Sudan People's Liberation Movement/Army, the Umma party and other Sudanese opposition parties.

131. SLM/A, as indicated by its name, is influenced in terms of agenda and structure by its southern counterpart, SPLM/A. During the Commission's meetings with the SLM/A leadership in Asmara, it was made clear that the group is divided into a political arm, the Movement, and a military arm, the Army. At the outset of the conflict, the structure of the SLM/A remained unclear. In October 2003, SLM/A reportedly held a conference in Northern Darfur State, during which changes in the structure were discussed and a clear division of work proposed between the military

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[35] Press release/commentary by SLM/A of 14 March 2003, available at http://www.sudan.net/news/press/postedr/214.shtml.

[36] Ibid.

and the political wings. Nowadays, and following the discussion members of the Commission had with SLM/A representatives in Eritrea, it appears that the movement's non-military chairman is Abdel Wahid Mohamed al-Nur and that the main military leader and the group's Secretary-General is Minnie Arkawi Minawi. The negotiation team in the peace talks with the Government is headed by Sherif Harir. Little is known about the detailed structure, or about the actual size of the military arm. According to information obtained by the Commission, SLM/A has acquired most of its weapons through the looting of Government installations, in particular police stations as well as army barracks. Other sources claim that foreign support has also played an important role in the build-up of the SLM/A forces. The Commission, however, was not in a position to confirm this.

132. The Commission obtained little information about the areas controlled by SLM/A in Darfur. While certain rural areas are said to be under the group's control, given its operation as a mobile guerrilla group, these areas of control are not fixed. In the beginning of the conflict most of the fighting seems to have taken place in Northern Darfur and the north of Western Darfur, while it gradually moved southward into Southern Darfur during the last months of 2004.

2. The Justice and Equality Movement

133. Like SLM/A, the Justice and Equality Movement is a Darfur-based rebel movement, which emerged in 2001, and formed part of the armed rebellion against the Government launched early in 2003. In the field, it is difficult to make a distinction between JEM and SLM/A, as most often reports on actions by rebels do not distinguish between the two. It has been reported that members of JEM have yellow turbans. It also appears that, while SLM/A is the larger military actor of the two, the JEM is more political and has a limited military capacity, in particular following the reported split of the group and the ensuing emergence of NMRD (see para. 139 below).

134. The Justice and Equality Movement is led by Khalil Ibrahim, a former State Minister who sided with Hassan El-Turabi when the latter formed the Popular National Congress in 2000. Various sources of information have stated that JEM have been backed by Turabi. While Turabi's role in and influence on JEM remains unclear, after an initial release following two years' detention in October 2003, he reportedly admitted that his party has links with JEM. However during a meeting with the members of the Commission, Khalil Ibrahim denied such a link, and stated that in fact Turabi was the main reason for the atrocities committed in Darfur.

135. The "Black Book" appears to be the main ideological base of JEM. This manifesto, which appeared in 2001, seeks to prove that there has been a total marginalization of Darfur and other regions of the Sudan, in terms of economic and social development, but also of political influence. It presents facts that aim to show "the imbalance of power and wealth in the Sudan". It was meant to be an anatomy of the Sudan that revealed the gaps and discrimination in contrast to the positive picture promoted by the Government. The Black Book seeks to show in a meticulous fashion how the Sudan's post-independence administrations have been dominated by three tribes, all from the Nile Valley north of Khartoum, which represent only about 5 per cent of the Sudan's population according to the official census. Despite this, the Black Book argues, these three tribes have held between 47 and 70 per cent of cabinet positions since 1956, and the Presidency until today.

Persons from the north are also reportedly overwhelmingly dominant in the military hierarchy, the judiciary and the provincial administration. According to the Black Book, those leaders have attempted to impose a uniform Arab and Islamic culture on one of the continent's most heterogeneous societies.[37] The message is designed to appeal to all marginalized Sudanese — whether of Arab, Afro-Arab or African identity, Christian or Muslim. Based on this ideology, JEM is not only fighting against the marginalization, but also for political change in the country, and has a national agenda directed against the present Government of the Sudan.

136. The Commission obtained very little information about the size and geographic location of JEM forces in Darfur. Most of its members appear to belong to the Zaghawa tribe, and most JEM activity is reported in the northern parts of Western Darfur. The Commission did find information about a number of incidents in which JEM had been involved in attacks on civilians (see below).

137. Early in May 2004, JEM split into two factions: one group under the leadership of Mr. Khalil, the other group comprising commanders in the field led by Colonel Gibril. The split reportedly occurred after the field commanders called a conference in Karo, near the Chadian border in Northern Darfur, on 23 May 2004. The conference was organized by the commanders to discuss directly with the political leaders the future of the movement and their ideological differences.

3. Other rebel groups

138. During 2004 a number of other rebel groups emerged. The Commission was not in a position to obtain detailed information about any of these groups nor did it meet with any persons openly affiliated with them.

139. One such group is the National Movement for Reform and Development (NMRD). On 6 June, NMRD issued a manifesto stating that it was not a party to the ceasefire agreement concluded between the Government and SLM/A and JEM in April, and that it was going to fight against the Government. The commanders and soldiers of this movement are mainly from the Kobera Zaghawa, a distinct sub-tribe of the Wagi Zaghawa, who are prominent in SLM/A. NMRD is particularly active in the Chadian border town of Tine and in the Jebel Moun area in Western Darfur.

140. On 14 December 2004, talks between the Government of the Sudan and an NMRD delegation began in N'Djamena, with Chadian mediation. On 17 December the parties signed two protocols, one on humanitarian access and another on security issues in the war zone. The protocols underscored the N'Djamena agreement of 8 April on a ceasefire, the Addis Ababa agreement of 28 May on the ceasefire committee and the Abuja protocols of 9 November. Under the protocols, both parties pledged to abide by a comprehensive ceasefire in Darfur, release war prisoners and organize voluntary repatriation for internally displaced persons and refugees.

141. In addition to NMRD, a small number of new armed groups have emerged, but very little information is available about their political agenda, composition and activities. One of these groups is named Korbaj, which means "whip" in Arabic, and is supposedly composed of members of Arab tribes. Another group is named Al-Shahamah, which in Arabic means "the Nobility Movement", and was first heard of at the end of September 2004, and is supposedly located in Western Kordofan State,

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[37] William Wallis, "The Black Book history or Darfur's darkest chapter", *Sudan Tribune*, 21 August 2004. Available at http://www.sudantribune.com/article.

which borders Darfur in the east. The group seeks fair development opportunities for the region, a review of the power and wealth-sharing agreement signed by the Government and SPLM, and a revision of the agreement on administrative arrangements for the Nuba Mountains and the Southern Blue Nile regions. A third group, the Sudanese National Movement for the Eradication of Marginalization, emerged in December 2004 when it claimed responsibility for an attack on Ghubeish in Western Kordofan. Little is known of this group, but some reports claim it is a splinter group from SLM/A. None of these three groups is a party to any of the agreements signed by the other rebel groups with the Government.

IV. The international legal obligations incumbent upon the Government of the Sudan and the rebels

142. In order to legally characterize the facts, the Commission must first determine the rules of international human rights law and humanitarian law against which those facts may be evaluated. It is important therefore to set out the relevant international obligations that are binding on both the Government and the rebels.

A. Relevant rules of international law binding the Government of the Sudan

143. Two main bodies of law apply to the Sudan in the conflict in Darfur: international human rights law and international humanitarian law. The two are complementary. For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights including those related to health, food and housing. They both include provisions for the protection of women and vulnerable groups, such as children and displaced persons. The difference lies in that, while human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflict.

144. States are responsible under international human rights law to guarantee the protection and preservation of human rights and fundamental freedoms at all times, in war and peace alike. The obligation of the State to refrain from any conduct that violates human rights, as well as the duty to protect those living within its jurisdiction, is inherent in this principle. Additional Protocol II to the Geneva Conventions evokes the protection of human rights law for the human person. This in itself applies the duty of the State to protect also to situations of armed conflict. International human rights law and humanitarian law are, therefore, mutually reinforcing and overlapping in situations of armed conflict.

145. Accountability for serious violations of both international human rights law and international humanitarian law is provided for in the Rome Statute of the International Criminal Court. The Sudan has signed but not yet ratified the Statute

and therefore is bound to refrain from acts which would defeat the object and purpose of the Statute.[38]

146. The following sections will address the particular provisions reflected in those two bodies of law that are applicable to the conflict in Darfur.

I. International human rights law

147. The Sudan is bound by a number of international treaties on human rights. These include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. The Sudan has signed, but not yet ratified, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. In contrast, the Sudan has not ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the Convention on the Elimination of All Forms of Discrimination against Women. At the regional level, the Sudan has ratified the African Charter on Human and Peoples' Rights. As a State party to these various treaties, the Sudan is legally bound to respect, protect and fulfil the human rights of those within its jurisdiction.

148. A number of provisions of those treaties are of particular relevance to the armed conflict currently under way in Darfur. These include (a) the right to life and to not be arbitrarily deprived thereof;[39] (b) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;[40] (c) the right not to be subjected to arbitrary arrest or detention;[41] (d) the right of persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity;[42] (e) the right to freedom of movement, to choose one's own residence and hence not to be displaced arbitrarily;[43] (f) the right to property,[44] to adequate housing and not

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[38] Vienna Convention on the Law of Treaties (1969), article 18. Ratified by the Sudan on 18 April 1990.

[39] International Covenant on Civil and Political Rights, article 6 (1); African Charter, article 4. The Human Rights Committee rightly held that this right is laid down in international norms that are peremptory in nature, or *jus cogens* (General Comment 29, at para. 11). See CCPR/C/21/Rev.1/Add.11, 31 August 2001.

[40] International Covenant on Civil and Political Rights, article 7; African Charter, article 5. The Human Rights Committee rightly held that this right is recognized in norms that belong to the corpus of *jus cogens* (General Comment 29, para. 11).

[41] International Covenant on Civil and Political Rights, article 9; African Charter, article 6. It is notable that the Human Rights Committee has stated that "the prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law"(General Comment 29, at para. 13 (b)).

[42] International Covenant on Civil and Political Rights, article 10.

[43] International Covenant on Civil and Political Rights, article 12; African Charter, article 12 (1). The Human Rights Committee held this right so important that in its view even a State making a declaration of derogation under article 4 of the Covenant would not be entitled to engage in forcible deportation or transfer of persons.

[44] African Charter, article 14.

to be subjected to forced eviction;[45] (g) the right to health;[46] (h) the right to adequate food[47] and to water;[48] (i) the right to fair trial;[49] (j) the right to effective remedy for any serious violations of human rights;[50] (k) the right to reparation for violations of human rights;[51] and (l) the obligation to bring to justice the perpetrators of human rights violations.[52]

149. In the case of a state of emergency, international human rights law contains specific provisions which prescribe the actions of States. In particular, article 4 of the International Covenant on Civil and Political Rights sets out the circumstances under which a State party may derogate temporarily from part of its obligations under the Covenant. Two conditions must be met in order for this article to be invoked: first, there must be a situation that amounts to a public emergency that threatens the life of the nation and, secondly, the state of emergency must be proclaimed officially and in accordance with the constitutional and legal provisions that govern such proclamation and the exercise of emergency powers.[53] The State also must immediately inform the other States parties, through the Secretary-General, of the provisions it has derogated from and of the reasons for such

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[45] International Covenant on Economic, Social and Cultural Rights, article 11.

[46] International Covenant on Economic, Social and Cultural Rights, article 12; Convention on the Rights of the Child, article 24; International Convention on the Elimination of All Forms of Racial Discrimination, article 5 (e) (iv); African Charter, article 16.

[47] International Covenant on Economic, Social and Cultural Rights, article 11.

[48] International Covenant on Economic, Social and Cultural Rights, articles 11 and 12. See Committee on Economic, Social and Cultural Rights, General Comment 15, which notes at paragraph 22 that "during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law. This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water" (footnotes omitted).

[49] International Covenant on Civil and Political Rights, article 14; African Charter, article 7.

[50] International Covenant on Civil and Political Rights, article 2 (3) and African Charter, article 7 (1) (a). The Human Rights Committee rightly held in its aforementioned General Comment 29 that this right "is inherent in the Covenant as a whole" (para. 14) and therefore may not be derogated from, even if it is not expressly provided for in article 4.

[51] International Covenant on Civil and Political Rights, articles 2 (3), 9 (5) and 14 (6). According to General Comment 31, of 26 May 2004, of the Human Rights Committee, "Article 2 (3) requires that State Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of the Article 2 (3), is not discharged." (CCPR/C/21/Rev.1/Add.13, at para. 16).

[52] International Covenant on Civil and Political Rights, article 2 (3). See General Comment 31 of the Human Rights Committee, which states: "A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy." (at para. 15) and "Where the investigations [of alleged violations of human rights] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with the failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (Article 7), summary and arbitrary killing (Article 6) and enforced disappearance (Articles 7 and 9 and, frequently, 6)." (at para. 18).

[53] General Comment 29, para. 2.

measures.[54] Even during armed conflict, measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.[55] In any event, they must comply with requirements set out in the Covenant itself, including that those measures be limited to the extent strictly required by the exigencies of the situation. Moreover, they must be consistent with other obligations under international law, particularly the rules of international humanitarian law and peremptory norms of international law.[56]

150. Article 4 of the International Covenant on Civil and Political Rights clearly specifies the provisions which are non-derogable and which therefore must be respected at all times. These include the right to life; the prohibition of torture or cruel, inhuman or degrading punishment; the prohibition of slavery, the slave trade and servitude; and freedom of thought, conscience and religion. Moreover, measures derogating from the Covenant must not involve discrimination on the ground of race, colour, sex, language, religion or social origin.

151. Other non-derogable "elements" of the Covenant, as defined by the Human Rights Committee, include the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person; the prohibition against taking hostages, abductions or unacknowledged detention; certain elements of the rights of minorities to protection; the prohibition of deportation or forcible transfer of population; and the prohibition of propaganda for war and of advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.[57] The obligation to provide effective remedies for any violation of the provisions of article 2, paragraph 3, of the Covenant must be always complied with.[58]

152. In addition, the protection of those rights recognized as non-derogable require certain procedural safeguards, including judicial guarantees. For example, the right to take proceedings before a court to enable the court to decide on the lawfulness of detention, and remedies such as *habeas corpus* or *amparo*, must not be restricted by derogations under article 4. In other words, "the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights".[59]

153. The Sudan has been under a continuous state of emergency since 1999 and, in December 2004, the Government announced the renewal of the state of emergency for one more year. According to the information available to the Commission, the Government has not taken steps legally to derogate from its obligations under the International Covenant on Civil and Political Rights. In any event, whether or not the Sudan has met the necessary conditions to invoke article 4, it is bound at a

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[54] See General Comment 29, para. 17, where the Committee states that notification "is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. [...] the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law."

[55] General Comment 29, para. 3.

[56] Ibid., paras. 9 and 11.

[57] Ibid., para. 13.

[58] Ibid., para. 14.

[59] Ibid., para. 15.

minimum to respect the non-derogable provisions and "elements" of the Covenant at all times.

2. International humanitarian law

154. With regard to international humanitarian law, the Sudan is bound by the four Geneva Conventions of 1949, as well as the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, of 18 September 1997,[60] whereas it is not bound by the two Additional Protocols of 1977, at least *qua* treaties. As noted above, the Sudan has signed, but not yet ratified, the Statute of the International Criminal Court and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and is therefore bound to refrain from acts which would defeat the object and purpose of that Statute and the Optional Protocol.

155. The Sudan also has signed a number of legally binding international agreements concerning the armed conflict in Darfur, all of which entered into force upon signature. Six of those agreements were made with the two groups of rebels, one was entered into solely with the African Union, and two only with the United Nations.[61] Most of the agreements contain provisions on international humanitarian law, in particular on the protection of civilians, as noted below.

156. In addition to international treaties, the Sudan is bound by customary rules of international humanitarian law. These include rules relating to internal armed conflicts, many of which have evolved as a result of State practice and jurisprudence from international, regional and national courts, as well as pronouncements by States, international organizations and armed groups.

157. The core of these customary rules is contained in article 3 common to the Geneva Conventions. It encapsulates the most fundamental principles relating to respect for human dignity which are to be observed in internal armed conflicts. Those principles and rules are thus binding upon any State, as well as any insurgent group that has attained some measure of organized structure and effective control over part of the territory. According to the International Court of Justice, the provisions of article 3 common to the Geneva Conventions constitute a minimum yardstick applicable to any armed conflict and reflect what the Court in 1949 [in the *Corfu Channel* case] called "elementary considerations of humanity".[62]

158. Other customary rules crystallized in the course of diplomatic negotiations for the adoption of the two Additional Protocols of 1977, for the negotiating parties became convinced of the need to respect some fundamental rules, regardless of whether or not they would subsequently ratify the second Protocol. Yet other rules were adopted at the 1974-1977 Diplomatic Conference as provisions that spelled out general principles universally accepted by States. States considered that such provisions partly codified, and partly elaborated upon, general principles, and that they were therefore binding upon all States or insurgents regardless of whether or

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[60] Ratified on 13 October 2003.

[61] See the Humanitarian Ceasefire Agreement on the Conflict in Darfur, of 8 April 2004; the Protocol on the Establishment of Humanitarian Assistance in Darfur, of 8 April 2004; the Protocol on the Improvement of the Humanitarian Situation in Darfur, of 9 November 2004; and the Protocol on the Enhancement of the Security Situation in Darfur in Accordance with the N'Djamena Agreement, also of 9 November 2004.

[62] *Nicaragua (merits)* (1986) at para. 218.

not the former ratified the Protocols. Subsequent practice by, or attitude of, the vast majority of States showed that over time yet other provisions of Additional Protocol II came to be regarded as endowed with a general purport and applicability. Hence they too may be held to be binding on non-party States and rebels.

159. That a body of customary rules regulating internal armed conflicts has thus evolved in the international community is borne out by various elements. For example, some States in their military manuals for their armed forces clearly have stated that the bulk of international humanitarian law also applies to internal conflicts.[63] Other States have taken a similar attitude with regard to many rules of international humanitarian law.[64]

160. Moreover, in 1995 the Secretary-General, in proposing to the Security Council the adoption of the statute of the International Criminal Tribunal for Rwanda, took what he defined as "an expansive approach" to Additional Protocol II. He suggested that the new Tribunal should also pronounce upon violations of Additional Protocol II which, as a whole, had not yet been universally recognized as part of customary international law and, in addition, for the first time criminalized common article 3 of the four Geneva Conventions (S/1995/134, of 13 February 1995, para. 12). Significantly, no member of the Security Council opposed the Secretary-General's proposal, demonstrating consensus on the need to make headway in the legal regulation of internal conflict and to criminalize deviations from the applicable law. Thus the Tribunal's statute in article 4 grants the Court jurisdiction over violations

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[63] For instance see the German manual (*Humanitarian Law in Armed Conflicts — Manual*, Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992). In para. 211, at p. 24, it is stated that "In a non-international armed conflict each party shall be bound to apply, as a minimum, the **fundamental humanitarian provisions of international law** embodied in the four 1949 Geneva Conventions (common Article 3), the 1954 Cultural Property Convention (article 19) and the 1977 Additional Protocol II. German soldiers like their Allies are required to comply with the rules of international humanitarian law in the conduct of military operations in all armed conflict however such conflicts are characterized"; emphasis in the original). See also the British manual (*Manual of the Law of Armed Conflict*, United Kingdom Ministry of Defence, Oxford, Oxford University Press, 2004). At pp. 384-98 it sets out what the United Kingdom Government considers to be "certain principles of customary international law which are applicable to internal armed conflicts" (para. 15.1, at p. 382).

[64] It is also significant that the United States also took the view that general rules or principles governing internal armed conflicts have evolved. Thus, for instance, before the adoption, in 1968, of General Assembly resolution 2444 (XXIII), in which the Assembly "affirmed" a set of principles to be complied with in any armed conflict, the United States representative stated that these principles "constituted a reaffirmation of existing law" (see *Official Records of the General Assembly, Twenty-third Session, Third Committee*, 1634th meeting). The principles were worded as follows: "(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible". In 1972 the United States Department of Defense noted that the resolution in question was "declaratory of existing customary international law" (see 67 *American Journal of International Law* (1973), at 124). Similarly, in 1987 the United States Deputy Legal Adviser to the State Department stated that "the basic core of Protocol II is, of course, reflected in common Article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (in 2 *American University Journal of International Law and Politics* (1987), at 430-431).

of common article 3 of the Geneva Conventions and Additional Protocol II, thereby recognizing that those violations constitute international crimes.

161. Furthermore, in 1995, in its judgement in *Tadić (Interlocutory Appeal)* the Appeals Chamber of the International Tribunal for the Former Yugoslavia held that the main body of international humanitarian law also applied to internal conflicts as a matter of customary law, and that in addition serious violations of such rules constitute war crimes.[65]

162. No less significantly, when the Statute of the International Criminal Court was drafted in Rome in 1998, some States expressly insisted that violations of international humanitarian law should also be regarded as war crimes.[66] More importantly, no State participating in the Diplomatic Conference opposed the inclusion in the Statute of a set of provisions granting the Court jurisdiction over violations of humanitarian law in internal armed conflict that were held to constitute war crimes.[67] This is indicative of the attitude of the vast majority of the States members of the international community towards the international legal regulation of internal armed conflict. Similarly, it is significant that the Statute was signed by 120 States, including the Sudan. This signature, although from the viewpoint of the law of treaties it only produced the limited effect emphasized above, is also material from the viewpoint of customary international law:[68] it proves that the general legal view evolved in the overwhelming majority of the international community, including the Sudan, to the effect that (a) internal armed conflicts are governed by an extensive set of general rules of international humanitarian law and (b) serious violations of those rules may involve individual criminal liability.[69]

163. The adoption of the Statute of the International Criminal Court, followed by the statute of the Special Court for Sierra Leone, can be regarded as the culmination of a law-making process that in a matter of a few years led both to the crystallization of a set of customary rules governing internal armed conflict and to the criminalization of serious breaches of such rules, in the sense that individual criminal liability may ensue from serious violations of those rules.

164. This law-making process with regard to internal armed conflict is quite understandable. As a result both of the increasing expansion of human rights doctrines and the mushrooming of civil wars, States came to accept the idea that it did not make sense to afford protection only in international wars to civilians and other persons not taking part in armed hostilities: civilians suffer from armed violence in the course of internal conflicts no less than in international wars. It

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[65] Paras. 96-127 as well as 128-137.

[66] For instance, see the statement of the French Foreign Minister, Hubert Védrine, in 44 *Annuaire français de droit international* (1998), at 128-129.

[67] See article 8 (2) (c)-(f).

[68] In various decisions international criminal tribunals have attached importance to the adoption of the Rome Statute as indicative of the formation of new rules of customary law or as codifying existing rules. See for instance *Tadić* (*Appeal*, 1999).

[69] This legal view was restated in the statute of the Special Court for Sierra Leone (2000), adopted following an agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000). Article 3 of the statute grants the Special Court jurisdiction over violations of common article 3 and Additional Protocol II, and article 4 confers on the Court jurisdiction over "other serious violations of international humanitarian law", namely, attacks on civilians or humanitarian personnel, as well as the conscription or enlistment of children under the age of 15.

would therefore be inconsistent to leave civilians unprotected in civil wars while protecting them in international armed conflicts. Similarly, it was felt that a modicum of legal regulation of the conduct of hostilities, in particular of the use of means and methods of warfare, was also needed when armed clashes occur not between two States but between a State and insurgents.[70]

165. Customary international rules on internal armed conflict thus tend both to protect civilians, the wounded and the sick from the scourge of armed violence, and to regulate the conduct of hostilities between the parties to the conflict. As pointed out above, they basically develop and specify fundamental human rights principles with regard to internal armed conflicts.

166. For the purposes of this report, it is sufficient to mention here only those customary rules on internal armed conflict which are relevant and applicable to the current armed conflict in Darfur. These include:

(a) The distinction between combatants and civilians, and the protection of civilians, notably against violence to life and person, in particular murder[71] (this rule was reaffirmed in some agreements concluded by the Government of the Sudan with the rebels);[72]

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[70] The powerful urge to apply humanitarian law to spare civilians from the horrors of civil war was expressed in 2000 by the then United States Ambassador-at-large for war crimes, David Scheffer, when he stated in 2000, if "the provisions of Protocol II were followed by rebel and government forces throughout the world, many of the most horrific human tragedies the world has documented within the past decade could have been avoided". See text in S. Murphy (ed.), *United States Practice in International Law*, vol. 1, 1999-2001 (Cambridge, Cambridge University Press, 2002), at 370.

[71] The rule is laid down in common article 3 of the 1949 Geneva Conventions, has been restated in many cases, and is set out in the 2004 British *Manual of the Law of Armed Conflict* (at para. 15.6). It should be noted that in his report made pursuant to paragraph 5 of Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on United Nations forces in Somalia, the Secretary-General noted that "The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope. Plainly a part of contemporary international customary law, they are applicable wherever political ends are sought through military means. No principle is more central to the humanitarian law of armed conflict than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants." (see S/26351). According to a report of the Inter-American Commission on Human Rights on the human rights situation in Colombia issued in 1999, international humanitarian law prohibits "the launching of attacks against the civilian population and requires the parties to an armed conflict, at all times, to make a distinction between members of the civilian population and parties actively taking part in the hostilities and to direct attacks only against the latter and, inferentially, other legitimate military objectives." (third report on the human rights situation in Colombia, OAS/Ser.L/V/II.102 Doc. 9, rev.1, 26 February 1999, para. 40).
See also *Tadić* (International Tribunal for the Former Yugoslavia Appeals Chamber), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (1995), paras. 98, 117, 132; *Kordić and Čerkez*, Case No. IT-95-14/2 (Trial Chamber III), *Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the limited Jurisdictional Reach of Articles 2 and 3*, 2 March 1999, paras. 25-34 (recognizing that articles 51(2) and 52(1) of Additional Protocol I and article 13(2) of Additional Protocol II constitute customary international law).

[72] See article 2 of the Humanitarian Ceasefire Agreement on the Conflict in Darfur, of 8 April 2004 (each party undertakes to "refrain from any violence or any other abuse of civilian populations")

(b) The prohibition on deliberate attacks on civilians;[73]

(c) The prohibition on indiscriminate attacks on civilians,[74] even if there may be a few armed elements among civilians;[75]

(d) The prohibition on attacks aimed at terrorizing civilians;[76]

(e) The prohibition on intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;[77]

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as well as article 2(1) of the Protocol on the Improvement of the Humanitarian Situation in Darfur, of 9 November 2004 (the parties undertake "to take all steps required to prevent all attacks, threats, intimidation and any other form of violence against civilians by any party or group, including the Janjaweed and other militias").

[73] See *Tadić (Interlocutory Appeal)*, at paras. 100-102. As the International Court of Justice held in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* (at para. 78), "States must never make civilians the object of attack". The general rule on the matter was restated and specified in article 51(2) of Additional Protocol I of 1977, whereby "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". A similar provision is contained in article 13(2) of Additional Protocol II of 1977. These provisions, in the part concerning the intention to spread terror, may be held to have turned into customary law, if only because they ultimately spell out a notion inherent in the customary law prohibition of any deliberate attack on civilians. See also article 8(2)(e)(i) of the Rome Statute and article 4 (a) of the statute of the Special Court for Sierra Leone.
It should also be mentioned that in 1991, replying to a question in Parliament, the German Minister for Foreign Affairs condemned "the continued military engagements of Turkish troops against the civilian population in Kurdish areas as a serious violation of international law"(in Bundestag, *Drucksache*, 12/1918, 14 January 1992, at 3). Furthermore, in a communiqué concerning Rwanda issued in 1994, the French Ministry of Foreign Affairs condemned "the bombardments against civilian populations who have fled to Goma in Zaire … The attacks on the security of populations are unacceptable" (communiqué of the Ministry of Foreign Affairs on Rwanda, 17 July 1994, in *Politique étrangère de la France*, July 1994, p. 101).

[74] This rule was held to be of customary nature in *Tadić (Interlocutory Appeal)*, at paras. 100-102, is restated and codified in article 13 of Additional Protocol II, which is to be regarded as a provision codifying customary international law, and is also mentioned in the 2004 British *Manual of the Law of Armed Conflict*, at paras. 15.6.5 and 15.15-15.15.1.

[75] In a press release concerning the conflict in Lebanon, in 1983, the International Committee of the Red Cross stated that "the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people." (ICRC, Press release No. 1474, Geneva, 4 November 1983).
In 1997 in *Tadić*, a Trial Chamber held that "it is clear that the targeted population [of a crime against humanity] must be of predominantly civilian nature. The presence of certain non-civilian elements in the midst does not change the character of the population" (judgement of 7 May 1997, at para. 638 and see also para. 643).

[76] See the 2004 British *Manual of the Law of Armed Conflict*, at para. 15.8.

[77] See paragraph 3 of Security Council resolution 1502 (2003), as well as article (8)(2)(e)(iii) of the Rome Statute and article 4 (b) of the statute of the Special Court for Sierra Leone.

(f) The prohibition of attacks against civilian objects;[78]

(g) The obligation to take precautions in order to minimize incidental loss and damage as a result of attacks,[79] such that each party must do everything feasible to ensure that targets are military objectives[80] and to choose means or methods of combat that will minimize loss of civilians;[81]

(h) The obligation to ensure that when attacking military objectives, incidental loss to civilians is not disproportionate to the military gain anticipated;[82]

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[78] Pursuant to paragraph 5 of General Assembly resolution 2675 (XXV), of 9 December 1970, which was adopted unanimously, and according to the 2004 British *Manual of the Law of Armed Conflict*, "can be regarded as evidence of State practice" (para. 15-16.2), "dwellings and other installations that are used only by the civilian population should not be the object of military operations". See also the 2004 British *Manual of the Law of Armed Conflict*, at paras. 15.9 and 15.9.1, 15.16 and 15.16.1-3.

[79] See the 2004 British *Manual of the Law of Armed Conflict*, at paras. 15.22-15.22.1.

[80] See *Zoran Kupreškić and others*, International Tribunal for the Former Yugoslavia Trial Chamber, judgement of 14 January 2000, at para. 260.

[81] See for instance the Military Manual of Benin (*Military Manual*, 1995, Fascicule III, pp. 11 and 14 ("Precautions must be taken in the choice of weapons and methods of combat in order to avoid civilian losses and damage to civilian objects ... The direction and the moment of an attack must be chosen so as to reduce civilian losses and damage to civilian objects as much as possible")), of Germany (Military Manual, 1992, at para. 457), of Kenya (*Law of Armed Conflict Manual*, 1997, Precis No. 4, pp. 1 and 8), of Togo (Military Manual, 1996, Fascicule III, pp. 11 and 14), as well as the *Joint Circular on Adherence to International Humanitarian Law and Human Rights* of the Philippines (1992, at para. 2 (c)). See also *Zoran Kupreškić and others*, International Tribunal for the Former Yugoslavia Trial Chamber, judgement of 14 January 2000, at para. 260.

[82] In *Zoran Kupreškić and others*, a Trial Chamber held in 2000 that "Even if it can be proved that the Muslim population of Ahmici [a village in Bosnia and Herzegovina] was not entirely civilians but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. Indeed, even in a situation of full-scale armed conflict, certain fundamental norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality." (judgement of 14 January 2000, at para. 513).

See also some pronouncements of States. For instance, in 2002, in the House of Lords the British Government pointed out that, with regard to the civil war in Chechnya, it had stated to the Russian Government that military "operations must be proportionate and in strict adherence to the rule of law." (in 73 *British Yearbook of International Law* 2002, at 955). The point was reiterated by the British Minister for trade in reply to a written question in the House of Lords (*ibidem*, at 957). See also the 2004 British *Manual of the Law of Armed Conflict*, at para. 15.22.1. In 1992, in a joint memorandum submitted to the United Nations, Jordan and the United States stated that "the customary rule that prohibits attacks which reasonably may be expected at the time to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited" (A/C.6/47/3, 28 September 1992, at para. 1(h)). In a judgement of 9 December 1985, an Argentinean Court of Appeals held in the *Military Junta case* that the principle of proportionality constitutes a customary international norm on account of its repeated doctrinal approbation. Spain insisted on the principle of proportionality in relation to the internal armed conflicts in Chechnya and in Bosnia and Herzegovina (see the statements in the Spanish Parliament of the Spanish Foreign Minister, in *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid 1995, at 353, 473).

In addition, see the 1999 third report on Colombia of the Inter-American Commission on Human Rights (OAS/Ser.L/V/II.102 Doc.9, rev.1, 26 February 1999, at paras. 77 and 79). See also the 1999 Secretary-General's *Bulletin*, para. 5.5 (with reference to United Nations forces).

(i) The prohibition on destruction and devastation not justified by military necessity;[83]

(j) The prohibition on the destruction of objects indispensable to the survival of the civilian population;[84]

(k) The prohibition on attacks on works and installations containing dangerous forces;[85]

(l) The protection of cultural objects and places of worship;[86]

(m) The prohibition on the forcible transfer of civilians;[87]

(n) The prohibition on torture and any inhuman or cruel treatment or punishment;[88]

(o) The prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, including rape and sexual violence;[89]

(p) The prohibition on declaring that no quarter will be given;[90]

(q) The prohibition on ill-treatment of enemy combatants *hors de combat* and the obligation to treat captured enemy combatants humanely;[91]

(r) The prohibition on the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by the world community;[92]

(s) The prohibition on collective punishments;[93]

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[83] Rome Statute, at article 8(2)(e)(xii). See also the 2004 British *Manual of the Law of Armed Conflict*, at paras. 15.17-15.17.2. Under article 23(g) of the Hague Regulations, it is prohibited "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war". The grave breaches provisions in the Geneva Conventions also provide for the prohibition of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (see First Geneva Convention, article 50 in fine; Second Geneva Convention, article 51 in fine; Fourth Geneva Convention, article 147 in fine; Additional Protocol I, article 51(1) in fine).

[84] Article 14 of Additional Protocol II; as rightly stated in the 2004 British *Manual of the Law of Armed Conflict*, at para. 15.19.1, "the right to life is a non-derogable human right. Violence to the life and person of civilians is prohibited, whatever method is adopted to achieve it. It follows that the destruction of crops, foodstuffs, and water sources, to such an extent that starvation is likely to follow, is also prohibited."

[85] Article 15 of Additional Protocol II; see also the 2004 British *Manual of the Law of Armed Conflict*, at para. 15.21.

[86] Article 16 of Additional Protocol II.

[87] Article 17 of Additional Protocol II; article 8(2)(e)(viii) of the Rome Statute, and referred to in the 2004 British *Manual of the Law of Armed Conflict*, at paras. 15.14, 15.14.1-2.

[88] See common article 3 (1) (a).

[89] See common article 3 (1) (c).

[90] See article 8(2)(e)(x) of the Rome Statute.

[91] See common article 3(1) as well as the 2004 British *Manual of the Law of Armed Conflict*, at para. 15.6.4.

[92] See common article 3 (1) (d); see also General Comment 29 of the Human Rights Committee, at para. 16.

[93] See article 4(b) of the statute of the International Criminal Tribunal for Rwanda and article 3 (b) of the statute of the Special Court for Sierra Leone; see also General Comment 29 of the Human

(t) The prohibition on the taking of hostages;[94]

(u) The prohibition on acts of terrorism;[95]

(v) The prohibition on pillage;[96]

(w) The obligation to protect the wounded and the sick;[97]

(x) The prohibition on the use in armed hostilities of children under the age of 15.[98]

167. It should be emphasized that the international case law and practice indicated above show that serious violations of any of those rules have been criminalized, in that such violations entail individual criminal liability under international law.

168. Having surveyed the relevant rules applicable in the conflict in Darfur, it bears stressing that to a large extent the Government of the Sudan is prepared to consider as binding some general principles and rules laid down in the two Additional Protocols of 1977 and to abide by them, although formally speaking it is not party to those Protocols. This is apparent, for instance, from the Protocol on the Establishment of Humanitarian Assistance in Darfur, signed on 8 April 2004 by the Government of the Sudan with SLA and JEM, stating in article 10 (2) that the three parties undertook to respect a corpus of principles, set out as follows:

> The concept and execution of the humanitarian assistance in Darfur will be conform [sic] to the international principles with a view to guarantee that it will be credible, transparent and inclusive, notably: the 1949 Geneva Conventions *and its two 1977 Additional Protocols*; the 1948 Universal Declaration on Human Rights, the 1966 International Convention [sic] on

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Rights Committee, at para. 11, according to which any such punishment is contrary to a peremptory rule of international law.

[94] See common article 3 (1) (b) of the 1949 Geneva Conventions as well as article 4 (c) of the statute of the International Criminal Tribunal for Rwanda and article 3 (c) of the statute of the Special Court for Sierra Leone.

[95] Article 4 (2)(d) of Additional Protocol II; article 4 (d) of the statute of the International Criminal Tribunal for Rwanda and article 3 (d) of the statute of the Special Court. In his report on the establishment of the Special Court for Sierra Leone, the Secretary-General stated that violations of article 4 of Additional Protocol II have long been considered crimes under customary international law. See also *Galić*, International Tribunal for the Former Yugoslavia Trial Chamber, judgement of 5 December 2003, at para. 769.

[96] Article 4 (2) (g) of Additional Protocol II and article 8(2)(e)(v) of the Rome Statute; see also the 2004 British *Manual of the Law of Armed Conflict*, at paras. 15.23-15.23.1.

[97] Common article 3 (2) of the Geneva Conventions.

[98] There are two treaty rules that ban conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities (see article 8 (2) (e)(vii) of the Rome Statute and article 4 (c) of the statute of the Special Court for Sierra Leone). The Convention on the Rights of the Child, at article 38, and the Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict raise the minimum age of persons directly participating in armed conflicts to 18 years, although not in mandatory terms (article 1 of the Protocol provides that "States Parties shall take *all feasible measures* to ensure that members of their armed forces who have not attained the age of *18 years* do not take a direct part in hostilities" (emphasis added); article 4 (1) contains a similar provision concerning rebels; articles 2 and 3 regulate the recruitment of children under 18). It may perhaps be held that a general consensus has evolved in the international community on a minimum common denominator: children under 15 may not take an active part in armed hostilities.

> Civil and Public [sic] Rights, the 1952 Geneva Convention on Refugees [sic], the Guiding Principles on Internal Displacement (Deng Principles) and the provisions of General Assembly resolution 46/182. (emphasis added)

169. The reference to the two Protocols clearly implies that the parties to the agreement intended to accept at least the general principles they lay down. The same implicit recognition of those principles can be inferred from the third preambular paragraph of the Protocol on the Enhancement of the Security Situation in Darfur in Accordance with the N'Djamena Agreement, of 9 November 2004, whereby the three parties condemn "all acts of violence against civilians and violations of human rights and international humanitarian law". A similar preambular paragraph is contained in the Protocol on the Improvement of the Humanitarian Situation in Darfur, also of 9 November 2004, where in addition the tenth preambular paragraph states that the parties are aware of the need to adhere to the humanitarian principles embodied in the Charter of the United Nations and other relevant international instruments.

170. Significantly, in article 8(a) of the status of mission agreement on the establishment and management of the Ceasefire Commission in the Darfur area of the Sudan, of 4 June 2004, between the Sudan and the African Union, it is provided that: "The African Union shall ensure that the Ceasefire Commission conducts its operation in the Sudan with full respect for the principles and rules of international Conventions *applicable to the conduct of military* and diplomatic personnel. These international Conventions include the four Geneva Conventions of 12 August 1949 and their *Additional Protocols of 8 June 1977* and the UNESCO Convention of 14 May 1954 on the protection of cultural property in the event of armed conflict and the Vienna Convention on Diplomatic Relations of 18 April 1961". (emphasis added) Article 9 then goes on to provide: "The Ceasefire Commission and the Sudan shall therefore ensure that members of their respective military and civilian personnel are *fully acquainted with the principles and rules of the above-mentioned international instruments*." (emphasis added)

171. The above provisions clearly, albeit implicitly, evince the will of the contracting parties to abide by the various treaties on humanitarian law, including the two Additional Protocols, although these Protocols per se are not binding *qua* treaties on the Sudan.

B. Rules binding rebels

172. SLM/A and JEM, like all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts referred to above. The same is probably true also for NMRD.

173. Furthermore, as with the implied acceptance by the Government of the Sudan of general international principles and rules on humanitarian law, such acceptance by rebel groups similarly can be inferred from the provisions of some of the agreements mentioned above.

174. In addition, SLM/A and JEM possess under customary international law the power to enter into binding international agreements (*jus contrahendi*), and have

entered into various internationally binding agreements with the Government. In those agreements the rebels have undertaken, among other things, to comply with humanitarian law. NMRD concluded two agreements with the Government of the Sudan on 17 December 2004, one on humanitarian access and the other on security issues in the war zone. In those agreements the parties pledged to release prisoners of war and organize the voluntary repatriation of internally displaced persons and refugees.

V. Categories of international crimes

175. Serious violations of human rights law and humanitarian law may amount to international crimes, subject to the conditions set out by the International Tribunal for the Former Yugoslavia in *Tadić (Interlocutory Appeal)* and largely codified in the Statute of the International Criminal Court. In other words, the violations may entail the individual criminal liability of their author or authors. Those violations may also involve the international responsibility of the State or of the international non-State entity to which those authors belong as officials, or for which they acted as de facto organs, with the consequence that the State or the non-State entity may have to pay compensation to the victims of those violations.

176. It is now necessary briefly to mention the various categories of crimes that might be involved in this process of legal classification.

177. *War crimes*. This class of international crimes embraces any serious violation of international humanitarian law committed in the course of an international or internal armed conflict, whether against enemy civilians or combatants, which entails the individual criminal responsibility of the person breaching that law (see *Tadić (Interlocutory Appeal)*, at para. 94). War crimes comprise, for instance, indiscriminate attacks against civilians, ill-treatment or torture of prisoners of war or of detained enemy combatants, rape of civilians, use of unlawful methods or means of warfare etc.

178. *Crimes against humanity*. These are particularly odious offences constituting a serious attack on human dignity or a grave humiliation or degradation of one or more human beings — for instance, murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape and other forms of sexual violence, persecution, enforced disappearance of persons. What distinguishes this category of crime from that of war crimes is that it is not concerned with isolated or sporadic breaches, but rather with violations, which (a) may occur either in time of peace or in time of armed conflict, and (b) constitute part of a widespread or systematic practice of atrocities (or attacks) committed against the civilian population.

179. With respect to the objective or material element of crimes against humanity, it should first be noted that the attack must be either widespread or systematic in nature.[99] Also, only the attack, not the individual acts of the accused, must be

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[99] See, for example, *Naletilić and Martinović* (International Tribunal for the Former Yugoslavia Trial Chamber), 31 March 2003, para. 236; *Akayesu* (International Criminal Tribunal for Rwanda Trial Chamber), 2 September 1998, para. 579, n. 144.

widespread or systematic.[100] As to the meaning of "widespread", a Trial Chamber of the International Tribunal for the Former Yugoslavia held in *Kordić and Čerkez* that a crime may be widespread or committed on a large scale by the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.[101] It can also consider the number of victims. [102] As for the requirement that the attack be "systematic", it requires an organized nature of the acts and the improbability of their random occurrence.[103] With regard to the factors to consider in assessing "widespread or systematic", the Tribunal Appeals Chamber rules that a Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a "widespread" or "systematic" attack.[104] It is not necessary, but it may be relevant, to prove the attack is the result of the existence of a policy or plan.[105]

180. The subjective element or mens rea required for this category of crime is twofold: (a) the criminal intent or recklessness required for the underlying crime (murder, extermination, rape, torture etc.); and (b) knowledge that the offence is part of a widespread or systematic practice. A specific subcategory of crimes against humanity, namely persecution, requires in addition a further mental element, namely, a persecutory or discriminatory animus or intent, namely to subject a person or a group to discrimination, ill-treatment or harassment on religious, racial, political, ethnic, national or other grounds, so as to bring about great suffering or injury to that person or group (see in particular the judgement of a Tribunal Trial Chamber in *Zoran Kupreškić and others*, at paras. 616-627).

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[100] See *Kunarac, Kovac and Vuković* (International Tribunal for the Former Yugoslavia Trial Chamber), 22 February 2001, para. 431.

[101] See *Kordić and Čerkez* (International Tribunal for the Former Yugoslavia Trial Chamber), 26 February 2001, para. 179.

[102] See, e.g., *Blaskić* (International Tribunal for the Former Yugoslavia Trial Chamber), 3 March 2000, para. 206; *Naletilić and Martinović* (Trial Chamber), 31 March 2003, para. 236; *Kayishema and Ruzindana* (International Criminal Tribunal for Rwanda Trial Chamber), 21 May 1999, para. 123.

[103] *Naletilić and Martinović* (International Tribunal for the Former Yugoslavia Trial Chamber), 31 March 2003, para. 236; see also *Kunarac, Kovac and Voković* (Appeals Chamber), 12 June 2002, para. 94.

[104] *Kunarac, Kovac and Voković* (Appeals Chamber), 12 June 2002, para. 95; see also *Jelisić* (Trial Chamber), 14 December 1999, para. 53: "The existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack."

[105] *Kunarac, Kovac and Voković*, para. 98; *Semanza* (International Criminal Tribunal for Rwanda Trial Chamber), 15 May 2003, para. 329; but see earlier case law: *Blaškić* (International Tribunal for the Former Yugoslavia Trial Chamber), 3 March 2000, para. 204; *Kayishema and Ruzindana* (International Criminal Tribunal for Rwanda Trial Chamber), 21 May 1999, paras. 123, 124, 581.

181. *Genocide*. Considering that the Security Council in resolution 1564 (2004) singled out this category of crime for a specific inquiry of the Commission into whether crimes perpetrated in Darfur can be classified as genocide, it is appropriate to devote a special section, below, to this crime. At this juncture, suffice it to say that, both under the 1948 Convention and the corresponding rules of customary law, genocide comprises various acts against members of a national, ethnic, racial or religious group (killing members of a group; causing serious bodily or mental harm to members of a group; deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of a group to another group), committed with the intent to destroy, in whole or in part, the group.

VI. Violations of international human rights and humanitarian law: the Commission's factual and legal findings

A. Overview of violations of international human rights and humanitarian law reported by other bodies

182. In accordance with its mandate set out by the Security Council, which requested the Commission to investigate reports of violations of human rights law and international humanitarian law, the Commission carefully studied reports from different sources including Governments, intergovernmental organizations, various United Nations mechanisms or bodies, and non-governmental organizations. Immediately following the establishment of the Commission, a note verbale was sent out to Member States and international and regional organizations on 28 October 2004, requesting that any relevant information be submitted to the Commission. A similar letter was sent to non-governmental organizations on 2 November 2004. The Commission subsequently received a great number of documents and other material from a wide variety of sources, including the Government of the Sudan. These materials were organized in a database and analysed by the Commission. The following is a brief account of those reports, which serves to clarify the context of the fact-finding and the investigations conducted by the Commission. In the sections following this overview, individual incidents are presented according to the type of violation or international crime identified.

183. Information presented in the earlier reports examined by the Commission is mainly based on witness accounts compiled through interviews of internally displaced persons and refugees. Some of the later reports are based on a broader inquiry drawing from other sources and methods to gather information, including satellite imagery to detect the destruction and burning of villages as well as field visits to Darfur itself. Those reports have also relied upon the findings of researchers and observers from different organizations monitoring the situation in Darfur.

184. Most reports note a pattern of indiscriminate attacks on civilians in villages and communities in all three Darfur States beginning early in 2003. Attacks also

occurred in 2001 and 2002,[106] but the magnitude, intensity and consistency of the attacks increased noticeably early in 2003. It is generally agreed that the escalation coincided with the intensification of the internal armed conflict between the Government and the two rebel movements, the Sudan Liberation Movement/Army and the Justice and Equality Movement. A large part of the information relates to the impact of that conflict on the civilian population, including reference to the methods of combat employed by the parties, and the counter-insurgency policies of the Government.

185. A common conclusion is that, in its response to the insurgency, the Government has committed acts against the civilian population, directly or through surrogate armed groups, which amount to gross violations of human rights and humanitarian law. While there has been comparatively less information on violations committed by the rebel groups, some sources have reported incidents of such violations. There is also information that indicates activities of armed elements that have taken advantage of the total collapse of law and order to settle scores in the context of traditional tribal feuds, or to simply loot and raid livestock.

186. There are consistent accounts of a recurrent pattern of attacks on villages and settlements, sometimes involving aerial attacks by helicopter gunships or fixed-wing aircraft (Antonov and MiG), including bombing and strafing with automatic weapons. However, a majority of the attacks reported are ground assaults by the military, the Janjaweed, or a combination of the two. Hundreds of incidents have been reported involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages. These incidents have resulted in the massive displacement of large parts of the civilian population within Darfur and to neighbouring Chad. The reports indicate that the intensity of the attacks and the atrocities committed in any one village spread such a level of fear that populations from surrounding villages that escaped such attacks also fled to areas of relative security.

187. Except in a few cases, the incidents are reported to have occurred without any military justification in relation to any specific activity of the rebel forces. This has strengthened the general perception among observers that the civilian population has been knowingly and deliberately targeted to achieve common or specific objectives and interests of the Government and the Janjaweed.

188. Eyewitness accounts of many incidents published in these reports mention that the assailant forces are in uniform, but make a distinction between the uniforms worn by the regular military and the Janjaweed. A variety of explanations have been offered for this distinction in the reports, including that the Government's Popular Defence Forces, largely recruited from within the Arab tribes, are included in the term Janjaweed as it is commonly used in the context of this conflict. Others allege that the Government provides the militia with these uniforms as well as weapons and see this as a confirmation of their affiliation and association with the Government.

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[106] For example, the Commission heard evidence of Government armed forces and Janjaweed attacks on Kabkabiya, Northern Darfur, in April 2001 and April 2002. According to witness testimonies, on 2 April 2001 the village of Shoba was attacked and looted, and 13 people were killed. On 28 April 2002, 217 houses were burned and 17 people were killed. See case study below (para. 252).

189. Some reports also contain accounts of military engagements between Government and rebel forces which have resulted in severe violations of the rights of civilian populations, and which demonstrate a complete disregard by the warring parties for their obligations regarding the security of civilians. It is reported that wanton acts of destruction, far exceeding any military imperative, were committed, mostly by Government forces. Janjaweed have featured in some of the incidents contributing to the destruction, particularly by inflicting harm on civilian populations and through wide-scale looting in the course of, or following, the battle.

190. Although there is little information on violations committed by the rebel forces, there are some reports that they have engaged in indiscriminate attacks resulting in civilian deaths and injuries and destruction of private property. There are further reports of the killing of wounded and imprisoned soldiers, attacking or launching attacks from protected buildings such as hospitals, abduction of civilians and humanitarian workers, enforced disappearances of Government officials, looting of livestock, commercial vehicles and goods. There are also allegations of the use of child soldiers by the rebels. However, it should be noted that the number of reported violations allegedly committed by the Government forces and the Janjaweed by far exceeds the number of cases reported on rebels.

191. While a majority of the reports are consistent in the description of events and the violations committed, the crimes attributed to the Government forces and Janjaweed have varied according to the differences in the interpretation of the events and the context in which they have occurred. Analyses of facts by most of the observers, nevertheless, suggest that the most serious violations of human rights and humanitarian law have been committed by militias, popularly termed "Janjaweed", at the behest of and with the complicity of the Government, which recruited these elements as a part of its counter-insurgency campaign.

192. Various reports and the media claim to have convincing evidence that areas have been specifically targeted because of the proximity to the locus of rebel activity, but more importantly because of the ethnic composition of the population that inhabits these areas. Almost all entities that have reported on the situation in Darfur have noted that the populations subjected to violations are Darfurians who identify themselves as Africans, distinguishable from the Arab tribes in the region, which are also reported to constitute the majority of the Janjaweed.

193. It is reported that among the African tribes, members of the Zaghawa, Fur and Masalit tribes, which have a marked concentration of population in some areas, have been particularly targeted. This is generally attributed to the fact that the two main rebel groups in Darfur are ethnically African and are largely drawn from these three tribes. It is for this reason that some observers have concluded that a major objective of destruction and depopulation of targeted areas is to eliminate or pre-empt any possibility of support for the rebels.

194. Some reports take into account the historical context of ethnic and tribal politics in Darfur, and differences in the way of life and means of livelihood[107] that have resulted in competing claims over control and utilization of natural resources

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[107] Most reports note that the Arab tribes in Darfur are generally associated with a nomadic lifestyle and that the vast majority of the African tribes are sedentary farmers, settled on land allotted to the tribes.

and land. On this basis, some reports conclude that elements of persecution and "ethnic cleansing" are present in the pattern of destruction and displacement.

195. This reading of the information by some sources has given an added dimension to the conflict. Deliberate destruction of the very means of survival of these populations has been seen as a design towards their permanent expulsion from their places of habitation. Many of the sources have suggested that the acts of killing, destruction and forced displacement, taken as a whole, amount to extermination. Some reports have implied, and a few have determined, that the elements of the crime of genocide are present in the patterns and nature of violations committed by the Government and its militias.

196. According to recent reports, even though military offensives and large-scale displacement of civilians in Northern and Western Darfur have diminished in the past few months, probably because large parts of the rural areas under Government control have been emptied of their rural inhabitants, violence there has not ceased. In Government-controlled areas, displaced civilians have remained largely at the mercy of the Janjaweed. Observers have reported that displaced civilians living under Government control in these areas remain virtual prisoners — confined to camps and settlements with inadequate food, shelter and humanitarian assistance, at constant risk of further attacks, rape and looting of their remaining possessions. Even if incidents are reported to the police or other Government officials, little or no action is taken to arrest perpetrators. Government-backed Janjaweed raids on new areas in Southern Darfur have also been reported. There have also been reports of unidentified "militia incursions" along the border into Chad, often with the apparent aim of raiding cattle and other livestock.

197. Concerns have been expressed that, despite the Government's assurances to the international community, the security situation has not improved. Most internally displaced persons remain afraid to return to their places of origin out of fear of renewed attacks and because of the prevailing situation of impunity for acts of violence committed against the civilian population. Some more recent reports note that Arab populations have begun to settle in a few areas previously occupied by the displaced populations.

198. One report noted that the situation in Darfur was being distorted by international organizations and international media. According to this source, the humanitarian situation was being blown out of proportion by most observers. The cause of the conflict should be mainly ascribed to tribal animosities, while the Government had responded to a rebellion and was also providing humanitarian assistance to the displaced and affected populations.

B. Information provided by the Government of the Sudan

199. As was stated earlier, the Commission met with numerous officials, representing various governmental sectors, including the Presidency, foreign affairs, justice, defence, interior, local government, and national security. The meetings were held in Khartoum and in the three States of Darfur. The officials presented the Government's point of view and policies with regard to the conflict in Darfur. While there are some variations in the views presented, there is a common thread that runs through the official version. In addition, the Government provided the Commission with a considerable amount of material, including documents and videotapes. Some

material was also provided in response to specific questions raised by the Commission.

200. The most coherent governmental perspective on the conflict was presented by a committee established by the Minister of the Interior in his capacity as the President's representative on Darfur. The Committee is composed of six senior officials from the Ministries of Defence and the Interior and the National Security and Intelligence Service and is presided over by a major general from the army. During three meetings that lasted over six hours, the Committee conveyed to the Commission views, statistics and documents. Most views presented by the Committee were echoed by many other high-ranking officials. Other officials, particularly some working with the Advisory Council on Human Rights, the National Security and Intelligence Service and the Governments in the three States of Darfur also presented documents that are reflected below.

201. Like many other Government organs, the Committee asserted that the conflict is tribal. It reported that while the region of Darfur has a history of co-existence between the various tribes in Darfur, there is also a history of tribal conflict. The conflicts were often resolved through traditional reconciliation conferences, which the Government is now trying to promote. With regard to the identity of various groups and whether they are Arab or African, the Committee maintained that there is no Arab-African divide as intermarriage among the various tribes is common. They also said that the Sudanese are considered Africans by the Arabs and Arabs by the Africans. Therefore there is no ethnic dimension to the conflict.

202. The Committee also argued that armed rebellion in Darfur is not new. It listed a number of armed opposition groups in Darfur since 1956. In fact it listed eight different armed movements that emerged in Darfur from independence until today.

203. The Committee attributed the current conflict to seven factors. The first factor is the competition between various tribes, particularly between the sedentary tribes and the nomadic tribes over natural resources as a result of desertification. The second factor is the weakening of local administration after it was dissolved by former President Nimeiri. That administration was established on the basis of the traditional tribal structures and was in the past capable of containing and mediating conflicts. The third factor is the weak presence of the police. The fourth factor is the interference of foreign actors in the situation in Darfur. The fifth factor is the wide availability of weapons and military uniforms as a result of other previous conflicts in the region, particularly the war between the Libyan Arab Jamahiriya and Chad, and the war in the south. The sixth factor is the politicization of issues and their exploitation by various political opposition parties in the Sudan. The seventh is the scant development and the relative lack of infrastructure of Darfur.

204. The Committee also listed all the tribal conflicts and all the peace agreements concluded between the tribes from 1932 to 2004. The list demonstrated that the conflicts were sometimes between so-called Arab tribes and African tribes; sometimes between different Arab tribes and sometimes between different African tribes. They were resolved in the traditional ways by the ajaweed (wise men) selected by the concerned tribes to mediate among them. The common feature of those conflicts was that they were often between the sedentary and the nomadic groups.

205. With regard to the current conflict, the Committee blamed the rebels, particularly SLA and JEM, for most of the atrocities committed in Darfur. Its view was that the rebels initiated attacks and that the Government was acting only in a defensive mode. It asserted that the Government sustained serious casualties, particularly highlighting the repeated attacks against the police, the local administration and other law enforcement agents. The Committee stated that 100 such attacks were documented and that they presented a pattern. Documents in police stations were burned by rebels and criminals were released. The Committee alleged that this led to the phenomena of the Janjaweed. The Committee said that when the Government captured rebel weapons during the attacks, they found that they included types of weapon that did not normally exist in the Sudan, implying that there is foreign sponsorship of the rebellion.

206. The Committee also presented statistics concerning attacks against civilians by the rebels from January 2003 until November 2004. It stated that there were 67 attacks in Northern Darfur, 60 in Southern Darfur, and 83 in Western Darfur. It stressed that Kulbus was attacked 27 times by the rebels. It charged the rebels with targeted killings, restriction of movement, levying taxes, obstructing education, looting hospitals, and attacks on humanitarian workers.

207. With regard to attacks on the armed forces during the same period, the Committee stated that from January 2003 until November 2004 there were 19 attacks in Northern Darfur; 16 in Southern Darfur; and 8 in Western Darfur. The Committee claimed that in Baram some soldiers as well as 13 civilians were killed by rebels inside the hospital. It claimed that most attacks were jointly carried out by SLA and JEM.

208. The Committee provided the Commission with numbers of casualties incurred and of weapons stolen from January 2003 to November 2004. With regard to the army, it was claimed that 937 were killed, 2,264 injured, and 629 were missing, and 934 weapons were stolen. With regard to the police, it was claimed that 685 were killed, 500 were injured, 62 were missing, and 1,247 weapons were looted. With regard to the security and intelligence apparatus, it was claimed that 64 were killed, 1 was injured, 26 were missing, and 91 weapons were looted. As for civilians, it was claimed that 1,990 were killed, 112 were injured and 402 were missing. Significantly, the Committee stated that no weapons were looted from civilians.

209. With regard to population displacement, the Committee maintained that rebels forced people out of their homes, who then sought protection in areas controlled by the Government. It further stated that the rebels inhibit internally displaced persons from returning. Some other officials noted that the destruction of villages was a normal consequence of the conflict where civilians had been caught in the crossfire. Some officials even admitted that the Government would track rebels into villages, since this is where they would hide, and that the destruction was caused by the ensuing fighting.

210. With regard to figures on displacement, the Committee said that the Government did not possess accurate figures but relied on the figures given by the international organizations. It claimed that the displaced were unwilling to cooperate and attacked Government officials, and that some leaders of the displaced exaggerated figures because they were benefiting from the situation. The Committee said that the Government tries to protect the civilian population, that it does not launch military operations against civilians and only targets rebels. It stated that the

camps for the internally displaced persons were now used as places from which to launch attacks against the Government.

211. The Committee maintained that the Government had taken several initiatives to solve the conflict peacefully, including a conference in El Fashir held in 2001 to address the roots of problems, particularly in and around Jebel Marra, as well as the establishment by the President of a committee to mediate between the tribes.

212. With regard to the Janjaweed, the Committee and other officials did not provide a consistent view. While some asserted that they were bandits from all tribes, other officials admitted that the Government sought the help of certain tribes and mobilized them. In particular, some interlocutors acknowledged that the Government had provided arms to the non-rebellious tribes and that there was cooperation with some tribal leaders who would receive financial grants to assist in the fight against the rebels. Some openly acknowledged that there had been a process of recruitment into the Popular Defence Forces in the context of the fight with the rebels.

213. The Government also asserted that it had taken measures to compensate those who, in its determination, were the subject of wrongful bombardment. It also stated that it had established an independent national commission of inquiry to examine the reports of violations. The effectiveness of such bodies are discussed in the course of this report.

C. Information provided by the rebel groups

214. As noted above, the Commission met with the leadership of the two main rebel movements, SLM/A and JEM in Asmara, as well as with other representatives in Darfur. With regard to the origins of the conflict and the incidents during the conflict, the two groups had very similar positions.

215. Both argued that since the independence of the Sudan in 1956, Darfur had been marginalized and underdeveloped. JEM noted that the central Government had been dominated essentially by three Arab tribes from the north of the country, who had consistently marginalized the other main regions (the south, the east, the Nuba Mountains, Kordofan, Blue Nile and Darfur), most of which have raised arms against the Government in response to the oppression, marginalization, "internal colonization" and neglect. The imbalance was illustrated by the fact that the north represented only 4 per cent of the population, but had by far the greatest influence and power in the central Government. According to the rebel groups, the main strategy of the central Governments has been to maintain power by keeping the other regions underdeveloped, divided and powerless. The war in the south with more than 2 million dead was an example of the Government's oppression.

216. SLM/A, in particular, noted the emergence in Darfur in the mid 1980s of an alliance of Arab tribes, the Arab Gathering, which had subsequently also been supported by the "Salvation" Government of Al-Bashir against the African tribes. In this context, tribes were seen to be either "pro-Salvation" or "anti-Salvation" and a political and racist agenda in a sense emerged. An important issue was the question of control over land. Since some tribes did not have traditional land allotted to them, and with the conflict over natural resources growing, there was a systematic attempt to evict tribes viewed as "non-Salvation" from their land.

217. In this sense, both rebel movements noted that they had started their activities as a response to the discriminatory and divisive policies of the Government in Khartoum. Both groups noted that their agenda was not tribal and was not directed against the Arab tribes. For this reason, the rebels had directed their attacks against Government installations, and had deliberately avoided attacking Arab tribes.

218. JEM underlined that its internal regulations contained strong commitments to respect international humanitarian law and international human rights law, and that no civilian targets had been or would be attacked. JEM underlined that all its military assets had been procured independently through its own means or acquired by looting from the Government.

219. Both rebel groups stated that the Government, supported by Arab militia, the Janjaweed, had attacked civilians throughout Darfur. The Government had created the Janjaweed by training and arming them. The rebel groups stated further that members of the Janjaweed had been recruited from those tribes without a traditional homeland, including Mohameed, Ireigat (northern Rizeigat), Iteifat, Zabalat and Maairiyha, as well as from outside the Sudan — from Chad, Cameroon, Mauritania and Algeria. The proof that the Government was linked to the Janjaweed was the fact that attacks were conducted jointly. The main reward for the Janjaweed was the promise of owning land, which also explained the massive forced displacement of the civilian population.

220. According to JEM, the Government and the Janjaweed had committed genocide by specifically targeting people from African tribes, specifically the Fur, Masalit, Zaghawa, Birgit, Aranga, Jebel and Tama. The Government armed forces, PDF, the National Security and Intelligence Service, the police and the Janjaweed have, since the beginning of the war, allegedly killed more than 70,000 persons, burned more than 3,200 villages and displaced more than 2 million persons. JEM claimed that the Government had issued an order to the police not to accept or investigate any complaints from African tribes.

221. According to JEM, extensive rape had been committed by the Government and the Janjaweed, including an alleged mass rape of 120 women in July 2003 in Tawila. JEM noted that the fact that no Arab woman had been raped and no Arab village had been destroyed was evidence that the Government was specifically targeting African tribes. In addition, the Government and the Janjaweed have repeatedly abducted women and children, and systematically looted property, including livestock, cash and utensils.

D. The task of the Commission

222. Taking these reports into account the Commission conducted independent investigations to establish the facts. The conclusions of the Commission are based on the evaluation of the facts gathered or verified through these investigations. However, reports from other sources are relied upon for analysis where the facts reported are consistent with the results of the Commission's own inquiry.

223. It was not possible for the Commission to investigate all of the many hundreds of individually documented incidents reported by other sources. The Commission, therefore, selected incidents and areas that were most representative of acts, trends and patterns relevant to the determination of violations of international human rights

and humanitarian law and with greater possibilities of effective fact-finding. In making this selection, access to the sites of incidents, protection of witnesses and the potential for gathering the necessary evidence were, among other things, of major consideration.

224. In addition to the material collected by the Commission during its visit to Darfur, the team of investigators working under its direction investigated a large number of incidents covering all three Darfur States (see annex IV for details).

E. Two irrefutable facts: massive displacement and large-scale destruction of villages

225. Results of the fact-finding and investigations are presented in the next sections of the report and are analysed in the light of the applicable legal framework as set out in the preceding section. Before proceeding, however, two uncontested facts must be highlighted.

226. At the time of the establishment of the Commission and, subsequently, upon its arrival in the Sudan in November 2004, two irrefutable facts about the situation in Darfur were immediately apparent. Firstly, there were more than 1 million internally displaced persons inside Darfur (1.65 million according to the United Nations) and more than 200,000 refugees from Darfur in neighbouring Chad to the east of the Sudan. Secondly, there were several hundred destroyed and burned villages and hamlets throughout the three States of Darfur. While the exact number of displaced persons and the number of villages destroyed remain to be determined, the massive displacement and the destruction of villages are facts beyond dispute. All observers and actors agree on this, and it was also confirmed to the Commission during its mission in November by all its interlocutors, be it the Government in Khartoum, the local administration in the three Darfur States, tribal leaders, international organizations and others.

227. The Commission has used these undisputed realities as the starting point for discharging its task to determine what actions led to the situation depicted by these two undeniable realities, and in particular which crimes resulting from violations of international humanitarian law and human rights were committed in the course of these events, as well as determining the actors responsible for them.

228. Before proceeding with the presentation of the results of the Commission's fact-finding as well as the legal appraisal of these facts, it is worth providing some facts on both the displacement and the destruction, so as to give a clear picture of the magnitude and scale of the situation.

1. Displacement

229. In its *Darfur Humanitarian Profile No. 8* of November 2004, the Office of the Deputy Special Representative of the Secretary-General for the Sudan and the United Nations Resident and Humanitarian Coordinator noted:

> The total conflict-affected population in Darfur is estimated at 2.27 million people, one third of the estimated pre-conflict population of 6.3 million. The total number of internally displaced persons in Darfur is estimated at 1.65 million, while the number of affected residents accessed by humanitarian agencies is about 627,000. […] The numbers are highest in Western Darfur

> with a total of 833,036 affected people, which is half of the pre-conflict Western Darfur population of 1.6 million. The Western Darfur figure includes 652,509 internally displaced persons. Southern Darfur has 761,030 conflict-affected people, including 595,594 internally displaced persons. Northern Darfur, registering the lowest number of the three Darfur States, has an estimated 685,200 conflict-affected people, of which 403,000 are internally displaced persons.
>
> In addition, […] in the three state capitals — Nyala, El Fashir and Geneina — none of the resident populations are included in the category of conflict affected, in part because their number is relatively large as compared to the internally displaced population that they are hosting. They are not yet judged to be in need of humanitarian assistance, although many of them may be increasingly vulnerable.[108]

It is noted that there are 101 locations, most of them camps, throughout the Darfur region hosting internally displaced persons, which include 22 locations in Northern Darfur, 42 locations in Southern Darfur and 37 locations in Western Darfur. Some camps host up to 70,000 persons while others are more modest in size and are host to "only" a few thousand internally displaced persons.

230. At a meeting with the Commissioner-General of the Government Humanitarian Aid Commission, Hassabo Mohammed Abdelrahman, on 12 January 2005, the Government of the Sudan confirmed to the Commission that the total number of internally displaced persons amounted to 1.651 million, and the total number of conflict-affected persons was 627,000. The Commissioner-General noted that the Government was generally in agreement with the figures noted in the *Humanitarian Profile* released by the United Nations quoted above. It was noted that the 1.65 million internally displaced persons were hosted in 81 camps and safe areas, with 300,000 hosted in actual camps. The Commissioner-General further stated that a total of 400,000 internally displaced persons had returned home, a figure the United Nations could not confirm.

231. In addition, as at 15 November 2004, the Office of the United Nations High Commissioner for Refugees (UNHCR) reported that 203,051 persons from the Darfur region were living in 11 camps and other locations as refugees in eastern Chad, along the border with the Sudan.[109]

232. The estimated number of conflict-affected populations in Darfur combined with the refugees in Chad (1.65 million internally displaced persons, 627,000 otherwise conflict-affected persons, and 203,051 refugees) reaches the staggering figure of almost 2.5 million persons affected in one way or another — the vast majority by being displaced from their homes.

2. Destruction of villages

233. While the massive displacement of population in Darfur became the face of the humanitarian crisis in the region, the widespread destruction of villages constitutes another irrefutable fact.

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[108] *Darfur Humanitarian Profile, No. 8*, November 2004, available at http://www.unsudanig.org.

[109] UNHCR data, available at http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=MEDIA&id=401159eca&page=publ.

234. During its visit to Darfur the Commission was able to make a visual estimate of the extent of destruction that had been caused in the course of the current conflict in all three Darfur States. The Commission saw destroyed and partially destroyed villages in aerial exploration over some of the affected areas such as those surrounding Mornei, Habila and Garsila in Western Darfur, parts of the Jebel Marra plateau in Southern Darfur, and the Tawila and Kutum area in Northern Darfur. Many of the villages were abandoned and there were areas comprising several villages which were completely deserted. To verify the facts, the Commission also visited some of the villages regarding which it had received specific information of attacks and destruction, including villages in the localities of Shataya and Masteri which were completely destroyed and abandoned.

235. There is an abundance of sites with evidence of villages burned, completely or partially, with only shells of outer walls of the traditional circular houses left standing. Water pumps and wells have been destroyed, implements for food processing wrecked, trees and crops were burned and cut down, both in villages and in the wadis,[110] which are a major source of water for the rural population. Rural areas in Darfur are not the only scenes of destruction. Several towns also show signs of damage to homes and essential infrastructure such as hospitals, schools and police stations.

236. The exact number of villages burned and destroyed has not been counted, but several sources have estimated the extent of destruction through verbal accounts, site inspections and other evidence. According to some estimates over 700 villages in all three States of Darfur have been completely or partially destroyed.[111] The Commission further received information that the police had made an assessment of the destruction and recorded the number of destroyed villages at over 2,000. The Government did not provide any official figures despite several requests in this regard from the Commission. The Commission nevertheless received credible accounts and itself visited some sites where hundreds of homes were burned in a single location.

F. Violations committed by the parties

237. The individual sections below give an account of the Commission's factual findings, organized according to the type of violation and the resulting international crime committed. In each section, initially a summary and analysis of the findings reported by other sources is presented. This is followed by an account of the findings made and information collected by the Commission on some individual incidents. Each section deals with the crimes committed by the three categories of actors identified, namely, the Government, the Janjaweed and the rebels. A legal appraisal of the factual findings is then provided.

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[110] Wadi: a mainly dry water course in arid regions through which water flows only after heavy rainfalls.

[111] Most sources assess that 600 villages and hamlets have been completely destroyed, while an additional 100 to 200 villages have been partially destroyed.

1. Indiscriminate attacks on civilians

(a) Factual findings

238. The Commission reviewed numerous reports of indiscriminate attacks on civilians. An analysis of all accounts by other sources reveals a pattern of indiscriminate attacks on civilians in villages and communities in all three Darfur States beginning early in 2003. Attacks are also reported to have occurred in 2001 and 2002. However the magnitude, intensity and consistency of the attacks increased noticeably early in 2003, in particular following the attack by rebel forces on the airport in El Fashir in April 2003. Attacks on civilians were still ongoing at the time of writing the present report.

239. The Commission also met with witnesses and received first-hand accounts of attacks on civilians from individuals and communities throughout the three Darfur States, as well as in Khartoum and in refugee sites in Chad. Reports received by the Commission were verified wherever possible through the work of the judicial investigators, forensic experts and military analysts assigned to work with the Commission. The Commission also received and verified numerous additional incidents involving attacks on civilians, based on information and evidence it received during the course of its work. These are illustrated through several case studies outlined in the sections below.

240. From all accounts the Commission finds that the vast majority of attacks on civilians in villages have been carried out by Government of the Sudan armed forces and Janjaweed, acting either independently or jointly. Although there have also been attacks by rebel forces, the Commission has found no evidence that these are widespread or that they have been systematically targeted against the civilian population. Incidents of rebel attacks are mostly against military targets, police or security forces. Nevertheless, there are a few incidents in which rebel attacks have been carried out against civilians and civilian structures, as well as humanitarian convoys. The following sections provide a description of the Commission's factual findings in relation to the patterns of attacks on civilians in the three Darfur States.

(i) Attacks by Government armed forces and the Janjaweed

241. On the basis of its analysis of other sources and its own investigative work, the Commission found that attacks on villages in Darfur conducted by Government of the Sudan armed forces and the Janjaweed occurred throughout the conflict, with peaks in intensity during certain periods. Most often the attacks began in the early morning, just before sunrise, between 4.30 a.m. and 8 a.m. when villagers were either asleep or at prayer. In many cases the attacks lasted for several hours. Some villages were attacked repeatedly over the course of several days and months.[112]

242. In many cases a ground attack began with soldiers appearing in Land Cruisers and other vehicles, followed by a large group of Janjaweed on horses and camels, all with weapons such as AK-47s, G-3s and rocket-propelled grenades. Many of the

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[112] For example, the village of Shoba in Northern Darfur was attacked by Janjaweed in April 2001 and April 2002, and by Government armed forces and Janjaweed in July 2003. The village of Amaki Sara in Southern Darfur reportedly was attacked by Janjaweed in September 2002, and by Government armed forces and Janjaweed on 30 October 2004, while rebel forces attacked a school in the village where police had established their headquarters on 2 October 2004.

attacks involved the killing of civilians, including women and children, the burning of houses, schools and other civilian structures, as well as the destruction of wells, hospitals and shops. Looting and theft of civilian property, in particular livestock, invariably followed the attacks and in many instances every single item of moveable property was either stolen or destroyed by the attackers. Often the civilians were forcibly displaced as a result of the attack.

243. Several of the attacks on villages were carried out with the support of Government of the Sudan forces, including the air force, involving air bombardments and regular aerial surveillance. The Commission received credible evidence of the use of Mi-8 helicopters, Mi-24 helicopters and Antonov aircraft during air attacks on villages. Ground attacks were frequently preceded by the presence of aircraft near or directly above the villages, which would either bomb the village or surrounding areas, or circle over the village and retreat.[113] In some cases, aircraft were used for reconnaissance purposes or to control and inform troops on the ground, while in other cases air support was used to supply ground troops with additional weapons and ammunition.[114] Several incidents involved aerial bombardment of areas surrounding the villages and/or bombing of civilians and civilian structures within villages themselves. The fact that some of the attacks received aerial support presents a clear indication of the link between the Janjaweed and the Government of the Sudan.

244. The effect of the repeated attacks on villages and the manner in which they were carried out, including regular aerial surveillance at dawn, hovering of helicopter gunships and frequent bombing, was to terrorize civilians and force them to flee the villages. Those who managed to find refuge in camps or host communities often refused to return to their villages for fear of further attacks.

245. In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masalit and Zaghawa tribes. When asked why they believed they were attacked, some witnesses stated "because they want our land and cattle" or "they want to eliminate us from the area". Other witnesses referred to statements made by their aggressors during some of the attacks, such as "you are *Torabora*, the SLA are your families"; "the Fur are slaves, we will kill them"; "we are here to

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[113] For example, the Commission verified evidence of an attack on Amaki Sara, Southern Darfur, on 30 October 2004. At 1300 hours that day, soldiers on foot attacked from the south-west of the village. At 1400 hours, the soldiers were joined by an air attack by two helicopters, both identified by witnesses from sketches as Mi-24, and two fixed-wing aircraft (one 4-prop. Antonov and one 2-prop. Antonov; both had a white upper fuselage and a black belly). The attack started from the direction of the large hill in the south-west of the village and circled it. The helicopters shot the people who were working in the fields but did not fire on the village. The fixed-wing aircraft only circled without firing weapons. As soon as the attack started, the villagers rapidly evacuated the area splitting to the north and south. Continuing to circle, the helicopters fired 57-mm rockets at the escaping villagers who the witnesses insist were unarmed. The helicopters appeared to deliberately target people hiding beneath trees and bushes south of the village. Two rockets hit an area beneath some trees and injured several persons. Similarly, two more rockets hit an area of bushes where villagers were attempting to hide, injuring several more. Janjaweed later looted the village.

[114] On 22 August 2003 at 0500 hours, a joint force of Government armed forces and Janjaweed, approximately 300 to 400 in strength, attacked the villages of Namai, Bogah and Debsa in Northern Darfur. Government soldiers used six Toyota pickups, camouflage green in colour with machine guns fitted to them, while the Janjaweed rode on horses and camels. An Mi-8 helicopter landed twice to the rear of the attackers, unloading ammunition on both occasions.

eradicate blacks (*nuba*)"; "we will drive you into poverty"; "this is not your land" or "you are not from here". When asked about the presence of armed groups within the villages, most witnesses denied the existence of rebels in their villages at the time they were attacked. In a few cases witnesses said that villagers had weapons to protect their livestock and families.

246. While in many cases witnesses clearly identified the attackers as Government soldiers or Janjaweed, the exact identity of individual perpetrators was difficult to ascertain. In most cases the attackers wore uniforms, similar to military uniforms, and either military caps or turbans, and were mounted on camels or horses. In at least one incident, witnesses identified Janjaweed by a horse-like sign worn on the shoulder (reportedly the emblem of the Popular Defence Forces). Victims were able in some cases to identify individual perpetrators as either neighbours or recognized leaders of particular Arab tribes. A few incidents seem to have involved the police acting together with Government armed forces and Janjaweed.[115] One of the cases reported to the Commission explicitly referred to the involvement in the attacks of PDF, together with regular Government armed forces and Janjaweed. In most cases, however, victims did not differentiate between Government armed forces on the one hand and militias, and other groups acting, or perceived to be acting, with the support of Government authorities, on the other. When asked whether the perpetrators were Government armed forces or Janjaweed, one victim stated, "for us, these are one and the same".[116]

247. It should also be noted that the Commission found no evidence of any warnings being issued to civilians prior to the attacks on villages.

248. Many of the ground and air attacks on villages resulted in the indiscriminate killing of civilians. In most cases of ground attacks, men were directly targeted to be killed and in some cases there is evidence of efforts by the perpetrators to spare the lives of women. However women and children were also victims of killings in the course of many attacks. Several of the attacks also involved sexual violence including rape of women as part of the attack on civilians. In most cases, victims named Janjaweed as perpetrators of sexual violence; however several incidents allegedly involved Government soldiers acting together with Janjaweed.

249. In this context, the Commission also noted the comments made by Government officials in meetings with the Commission. The Minister of Defence clearly indicated that he considered the presence of even one rebel sufficient for making the whole village a legitimate military target. The Minister stated that once the Government received information that there were rebels within a certain village, "it is no longer a civilian locality, it becomes a military target". In his view, "a village is a small area, not easy to divide into sections, so the whole village becomes a military target". It is also worth noting that the Western Darfur Minister of Social Affairs, who is also the Deputy *Wali* of the State of Western Darfur, considered the

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[115] On 5 October 2003 the village of Haloof in Southern Darfur reportedly was attacked by Government armed forces and Janjaweed. According to witness testimony, the Janjaweed included two "policemen". Twenty-four civilians were killed and several others injured. In a separate incident on 22 May 2004, the village of Abqa Rajil in Southern Darfur was attacked by Government armed forces and police just before sunrise. Subsequently the Commission obtained information that six persons, including two policemen, were tried and convicted.

[116] Witness testimony regarding the attack on Haloof village on 5 October 2003, as received by members of the Commission during visit to Southern Darfur.

villagers responsible for the destruction that led to their massive displacement on the grounds that they allowed their sons to join the rebels and to use their own villages for insurgent activities.

250. The indiscriminate nature of attacks by Government armed forces and the Janjaweed on civilians and civilian objects in villages is illustrated in the case studies below.

Case study: Anka village, Northern Darfur

251. The Commission investigated the scene of an attack in and around Anka village in Northern Darfur. The following facts were established through witness interviews and forensic investigations:

> At about 9 a.m. on or about 17 or 18 February 2004 the village of Barey, situated about 5 km from the village of Anka, was attacked by a combined force of Government soldiers and Janjaweed. A witness from Barey then alerted the villagers of Anka to a possible imminent attack.
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> At about 5 p.m. on the same day, witnesses from Anka observed between 300 and 400 Janjaweed on foot, and another 100 Janjaweed on camels and horseback, advancing towards Anka from the direction of Barey. The attackers were described as wearing the same khaki uniforms as the Government soldiers, and were armed with Kalashnikovs G-3s and rocket-propelled grenades (RPGs).
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> Witnesses observed about 18 vehicles approaching from behind the Janjaweed forces, including four heavy trucks and 18 Toyota pickup vehicles. Some of the vehicles were green and others were coloured navy blue. The pickups had DShK (12.7-mm tripod mounted machine guns) fitted on to the back, and one had a Hound rocket launcher system which was used to fire rockets into and across the village. The trucks carried Government armed forces and were later used to transport looted property from the village.
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> According to witnesses, villagers fled the village in a northerly direction, towards a wooded area about 5 km from the village.
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> Before the Janjaweed entered the village, the Government armed forces bombed the area around the village with Antonov aircraft. One aircraft circled the village while the other one bombed. The first one was coloured white and had a black underside, while the second one was completely white. The bombing lasted for about two hours, during which time 20 to 35 bombs were dropped around the outskirts of the village. A hospital building was hit during the bombardment.
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> After the bombing the Janjaweed and Government soldiers moved in and looted the village, including bedding, clothes and livestock. Remaining buildings were then destroyed by burning. Janjaweed also fired RPGs into the village from the top of the hill overlooking Anka. The bombing of the areas around the village appears to have been conducted in order to facilitate the looting and destruction of the village by Janjaweed and Government armed forces on the ground.

According to witnesses, approximately 30 SLM/A members were present in the village at the time of the attack, apparently to defend the village following the announcement of the imminent attack.

Fifteen civilians were killed in Anka as a result of shrapnel injuries during and after the attack, 8 others were wounded. While some have recovered, others are reportedly disabled as a result of their injuries. The village is now totally deserted.

Case study: Shoba, Kabkabiya

252. The Commission received credible information from witnesses in relation to three separate attacks on civilians in villages in the Shoba area, Kabkabiya, Northern Darfur:[117]

The first attack began at 8.30 a.m. on 2 April 2001, a market day. Arab militia reportedly attacked Shoba West and Shoba Karika with the intention of looting animals. However, 15 people were killed and nine were wounded as a result of the attack. Approximately 55 Arab militia, wearing camouflage green uniforms and armed with AK-47s, G-3s and RPGs, attacked the villages on horses and camels. The leader of the attack and the identity of several other attackers were known to the victims and were reported to the police station nearby. The police investigated the incident and arrested four suspected perpetrators, who were still in the village at the time. According to witnesses, no rebels were present in the village either at the time of the attack or at any other time.

Approximately 100 Arab militia attacked Shoba West and Shoba Karika from the north in a second incident on 28 April 2002. The perpetrators of the second attack matched the profile of those responsible for the first attack, and were led this time by two senior leaders of the Arab militia. Twenty-four people were killed during the attack and another 23 were injured, 338 houses were burned, and the north and east of the village were completely destroyed. Property belonging to villagers, including all livestock, food and medicine, was looted. According to witnesses, the attack lasted from 4.15 a.m. until about 9.30 a.m. when Government forces arrived. Villagers identified the perpetrators, who were about 500 m from the village with the looted goods. However, the Government soldiers reportedly refused to pursue them and one officer told a witness that he was under instructions not to pursue the attackers. Government armed forces later confiscated the villagers' weapons. Some time following the attack the Minister of the Interior visited the area, together with the *Walis* of the three Darfur States, to appraise the situation, and later sent food and support to rebuild the village.

A third attack took place from 5 a.m. to 6 p.m. on 25 July 2003, this time on Shoba East and Shoba West. According to reports, the attack was led by the two senior Janjaweed leaders and involved approximately 400 Janjaweed and Government armed forces using camels, horses and Land Cruisers armed with 12.7-mm machine guns. The villages were totally destroyed during the attack. Forty-two people were killed and 10 were injured and every item of moveable property in the villages was looted.

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[117] This information was corroborated by reported investigations by other independent sources.

Case study: Adwa

253. The Commission investigated reports of a recent attack by Government armed forces and Janjaweed on the village of Adwa in Southern Darfur:

> According to witnesses, on 23 November 2004 at 6 a.m. Government of the Sudan armed forces in complicity with Janjaweed launched an attack on Adwa. Rebel forces reportedly held a base on top of the mountains near Adwa, and a battle between Government soldiers and rebel forces ensued. Two helicopter gunships and an Antonov aircraft were used during the attack, possibly for reconnaissance purposes. Ground forces used various weapons including AK-47, G-3 and G-4 assault rifles, RPG-7, machine guns, and DShK 12.7-mm machine guns mounted on vehicles. According to witness reports, civilians including women, children and elderly persons were targeted during the attack. Many were forced to flee to a nearby mountain where they remained for several days. There are reports that Government and Janjaweed armed forces instructed women not to flee and told them that they were not targets. However, some women were captured and several were detained by the attackers for two days. Men were summarily shot, as was anyone who attempted to escape. Young girls were taken by the attackers to another location and many were raped in the presence of other women. The attackers looted the village. While in the mountains, several of the victims reportedly were shot by Government soldiers and Janjaweed. Many people were killed and more than 100 persons were injured. Following the attack, representatives of an international organization searched the village and found several injured women and children, whom they escorted to hospital. They also found the bodies of between 20 and 30 civilians who had been killed during the attack, including women and children. All of the victims were reportedly from Adwa and belonged to the Fur tribe. It is also alleged that many are still to be found in the mountains.

(ii) Attacks by rebel forces

254. The Commission also found that rebel forces have been responsible for attacks, in most cases against military targets, police or security forces. In Western Darfur, for example, rebel forces attacked a police station in Tongfuka in October 2003. In Southern Darfur, according to witnesses, rebels attacked and looted a police station and Government offices in Yassin in January 2004. In Northern Darfur, rebel forces attacked a police station in Tawila, killing 28 policemen. According to witness reports, most attacks against military targets by rebel forces have been conducted by SLM/A, acting either independently or together with rebel forces of JEM.

255. The Commission also received information from witnesses of a number of attacks by rebel forces on villages and individual civilians. In three separate incidents in Western Darfur, members of JEM attacked the town of Kulbus. During the first attack JEM arrived at around 3 p.m. on 4 October 2003 in 35 Land Cruisers, surprising Government armed forces in the town. Some were wearing military dessert camouflage uniforms and others were in civilian clothing, riding horses and camels, and carrying weapons such as RPGs, Garanov, Kalashnikov, GM-4, Katyusha Hawn 106, Hawn 120 and machine guns. Forty-two soldiers and 17 civilians, all male, were killed along with one child. Fifty civilians were injured.

On 25 and 26 December 2003, more than 40 vehicles loaded with JEM soldiers again attacked Kulbus. However, the attackers were held back by Government armed forces and could not get into the town. Twenty-eight Government soldiers were killed along with four male civilians.

256. Rebel forces reportedly have been responsible also for attacks carried out against civilian convoys, including vehicles carrying humanitarian supplies. The Commission received information in relation to attacks and looting by rebels of commercial vehicles, trucks carrying humanitarian supplies, cargo trains or passenger buses. However, the Commission was not able to verify those reports through its own investigations. The Government of the Sudan presented the Commission with a document listing attacks on humanitarian convoys.

Case study: Baram

257. In one particularly serious series of incidents, rebel forces conducted attacks in Baram, Southern Darfur on three separate occasions:

> During the first attack, at 6 a.m. on 13 March 2004, rebels arrived in Baram from the north in eight Land Cruisers, each containing 9 or 10 soldiers. The attackers wore a variety of different military uniforms. They attacked the local office of the National Security and Intelligence Service, setting it alight, and then proceeded to shoot at the Sudan Telecommunications office. They then attacked the police station, killing two policemen and removing weapons and ammunition. From there they went to the offices of the local administration where they stole two safes and destroyed official documents. They went to the *Zakat* (religious tax) office, where they destroyed documents, stole the safe and a Mitsubishi pickup truck. They went to the bank where they removed two safes and set fire to the building. They also stole a truck belonging to a civilian. A crowd of people witnessed the incident and followed the attackers. They were apparently unafraid because the rebels had announced that they were not going to hurt anyone other than the targets that they had chosen, including certain officials. The rebels went to the house of the security manager, who reportedly had already fled with his family, set fire to the house and stole the security manager's vehicle. The following morning at 5 a.m. the rebels left town towards Shurab. At Wadi Haggam they stole weapons from the police. At Hufrat-an-Nahas they attacked a military contingent and killed 17 Government soldiers.
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> A second attack was carried out a week later, reportedly by the same perpetrators driving the same vehicles as were used in the first attack. After arriving in the village at 2 p.m., the attackers went to the prison and released all prisoners. The rebels invited the prisoners to join them, which some did. The attackers set fire to the prison, killed one prison guard and beat another. They then left the village, taking with them the prisoners who had joined them. After the attack, the rebels stated publicly that they had come to liberate the people by force and that they wanted popular support.
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> Later the rebels became involved in a battle with Government military forces in a location nearby. In that battle, soldiers who had been injured were brought to Baram for medical attention. Rebels fired shots at the hospital buildings and killed both soldiers and civilians. The Commission could not confirm a claim

by the Government that injured soldiers and civilians had been killed inside the hospital building.

(b) Legal appraisal

258. As stated above, various provisions of human rights and international humanitarian law are relevant to the protection of civilians in armed conflict. International law prohibits any attack deliberately directed at civilians, that is, persons who do not take a direct part in armed hostilities. International law also prohibits indiscriminate attacks on civilians, that is, any attack on areas or places where both civilians and combatants may be found, which is not directed at a specific military objective, or employs methods or means of combat which cannot be directed at a specific military objective. Parties to the conflict therefore must at all times distinguish civilians from those taking a direct part in the hostilities, as well as differentiating civilian objects from military objectives. Deliberate attacks on civilian objects are prohibited. The notion of "civilian objects" embraces all objects (houses, private dwellings, orchards, schools, shelters, hospitals, churches, mosques, synagogues, museums, works of art, and so on) that do not serve, and are not used for, military purposes.

259. To ensure that attacks on places or areas where both civilians and combatants may be found do not unlawfully jeopardize civilians, international law imposes two fundamental obligations, applicable both in international and internal armed conflicts. First is the obligation to take precautions for the purpose of sparing civilians and civilian objects as much as possible. Such precautions, laid down in customary international law, are as follows: a belligerent must (a) do everything feasible to verify that the objectives to be attacked are not civilian in character; (b) take all feasible precautions in the choice of means and methods of combat with a view to avoiding or at least minimizing incidental injury to civilians or civilian objects; (c) refrain from launching attacks which may be expected to cause incidental loss of civilian life or injury to civilians or civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated; (d) give effective advance warning of attacks which may affect the civilian population, except in cases of assault (as provided for in article 26 of the Hague Regulations of 1907) or, as provided for in article 57(2)(C), unless circumstances do not permit — namely when a surprise attack is deemed indispensable by a belligerent. Such warnings may take the form of dropping leaflets from aircraft or announcing on the radio that an attack will be carried out. According to the Commentary on the Additional Protocols to the Geneva Conventions (ICRC, Y. Sandoz and others, eds., 1987, at para. 2224) a warning can also be given by sending aircraft that fly at very low altitude over the area to be attacked, so as to give civilians the time to evacuate the area.

260. The second fundamental obligation incumbent upon belligerents — or, more broadly, on any party to an international or internal armed conflict — is to respect the principle of proportionality when conducting attacks on military objectives that may entail civilian losses. Under this principle a belligerent, when attacking a military objective, shall not cause incidental injury to civilians disproportionate to the concrete and direct military advantage anticipated. In the area of combat operations the principle of proportionality remains a largely subjective standard, based on a balancing between the expectation and anticipation of military gain and the actual loss of civilian life or destruction of civilian objects. It nevertheless plays

an important role, first of all because it must be applied in good faith, and secondly because its application may involve the prohibition of at least the most glaringly disproportionate injuries to civilians. One can therefore appreciate statements such as that of Judge R. Higgins in her Dissenting Opinion appended to the Advisory Opinion delivered in *Legality of the Threat or Use of Nuclear Weapons*. She pointed out that "The principle of proportionality ... is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack." (para. 20, at p. 587).

261. Intentionally directing attacks against the civilian population as such, or against civilians not taking a direct part in hostilities, is a serious violation of international humanitarian law and amounts to a war crime.[118] The components of this war crime are identical whether the acts are committed in the course of an international or non-international armed conflict.[119]

262. The Commission's factual findings in relation to attacks on civilians in Darfur must be analysed from the perspective of the prohibition of indiscriminate attacks on civilians. In this regard, it is necessary to consider whether (a) precautions were taken to ensure the protection of civilians and civilian objects, and (b) the attacks were proportionate to the military objectives.

263. As noted above, one justification given for the attacks by Government of the Sudan armed forces and Janjaweed on villages is that rebels were present at the time and had used the villages as a base from which to launch attacks — or, at the very least, that villagers were providing support to the rebels in their insurgency activities. Government officials therefore suggested that the villagers had lost their legal status as protected persons.

264. The International Tribunal for the Former Yugoslavia has held that a wide definition of civilian population is justified, in the context of crimes against humanity, and that the presence of those actively involved in the conflict should not

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[118] Statute of the International Criminal Court, article 8 (2) (c) (i).

[119] They include:

- the perpetrator directing an attack
- the object of the attack being a civilian population or individual civilians not taking direct part in hostilities
- the perpetrator intending the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack
- the conduct taking place in the context of and being associated with a non-international armed conflict
- the perpetrator being aware of factual circumstances that established the existence of an armed conflict.

The mental element of an attack on a civilian population is inferred where "the civilian character of the objects damaged was known or should have been known", and "the attack was wilfully directed at civilian objects". Article 8 (2) (e) (i), Rome Statute. See also the International Tribunal for the Former Yugoslavia, Review of the Indictment, *The Prosecutor v Milan Martić*, IT-95-11-R61, 108 ILR 39 at 45, which states "there exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterization as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. As the Appeals Chamber affirmed ... the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law."

prevent the characterization of a population as civilian.[120] In another case, the Tribunal again considered the different elements of an attack directed against a civilian population as part of the definition of crimes against humanity. According to a Trial Chamber, as a minimum, the perpetrator must have known or considered the possibility that the victim of his crime was a civilian and stressed that in case of doubt as to whether a person is a civilian, that person shall be considered to be civilian.[121] Similarly, the International Criminal Tribunal for Rwanda held that where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.[122] Drawing on this reasoning, it is clear that the mere presence of a member or members of rebel forces in a village would not deprive the rest of the village population of its civilian character.

265. Furthermore, as pointed out above, and contrary to assertions made to the Commission by various Government officials, it is apparent from consistent accounts of reliable eyewitnesses that no precautions have ever been taken by the military authorities to spare civilians when launching armed attacks on villages. No eyewitnesses reported that leaflets had been launched, or that warnings had been given on the radio or through the tribal chiefs, or that aircraft had flown low over villages to warn civilians of an imminent attack. Moreover, the mode and pattern of aerial flights preceding attacks can in no way be construed as warning signals, as these were clearly part of the attack. Even the Government has not used this as a defence of its position on aerial attacks or support of ground forces during attacks.

266. The issue of proportionality did obviously not arise when no armed groups were present in the village, as the attack exclusively targeted civilians. However, whenever there might have been any armed elements present, the attack on a village would not be proportionate, as in most cases the whole village was destroyed or burned down and civilians, if not killed or wounded, would all be compelled to flee the village to avoid further harm. The civilian losses resulting from the military action would therefore be patently excessive in relation to the expected military advantage of killing rebels or putting them *hors de combat*.

267. *Concluding observations*. It is apparent from the Commission's factual findings that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they attacked there were rebels present or at least some rebels were hiding there, or that there were persons supporting rebels — an assertion that finds little support from the material and information collected by the Commission — the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack.[123] The impact of the attacks shows that the military force used was manifestly disproportionate to any threat posed by the rebels. In fact, attacks were most often intentionally directed against civilians and civilian objects. Moreover, the manner in which many attacks

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[120] *Tadić*, op. cit., Trial Chamber II judgement of 7 May 1997, para. 643.

[121] *Kunarac et al*, case Nos. IT-96-23-T and IT-96-23/1-T, judgement of 22 February 2001, para. 435.

[122] *Akayesu*, Case No. ICTR-96-4-T, Trial Chamber decision of 2 September 1998, para. 582.

[123] Statements to the contrary were made to members of the Commission by some Government officials, but in spite of repeated requests by the Commission to provide evidence of warnings those statements were never corroborated.

were conducted (at dawn, preceded by the sudden hovering of helicopter gunships and often bombing) demonstrates that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masalit and Zaghawa tribes. From the viewpoint of international criminal law these violations of international humanitarian law no doubt constitute large-scale war crimes.

268. From the Commission's findings it is clear that the rebels are responsible for attacks on civilians, which constitute war crimes. In general, the Commission has found no evidence that attacks by rebels on civilians have been widespread, or that rebel attacks have systematically targeted the civilian population.

2. Killing of civilians

(a) Factual findings

(i) Killing by Government forces and/or militias

269. The Commission has had access to a vast number of reports from various sources which document extensive killings of civilians throughout Darfur, from the beginning of 2003 up to the time of publication of this report. Those reports note that the great majority of the killings were committed by people whom witnesses described as Janjaweed, in most cases uniformed and on horses or camels. It is reported that the killings were generally committed during attacks on villages or hamlets. The reports further note that the killings were often the result of gunfire. Witness testimonies reflected in the reports describe attackers with Kalashnikovs and other automatic weapons shooting either indiscriminately or targeting specific people, usually men of military age. The use of other weapons, such as swords, has also been noted, albeit less frequently. In some of the cases, killings are reported to have occurred on a massive scale, with hundreds of civilians being killed in the course of an attack. Incidents of confinement of the civilian population, accompanied by arbitrary executions, have also been reported, as well as civilian deaths as a result of indiscriminate air attacks by Government forces. The reports note that killings have continued during displacement in camps at the hand of the militias surrounding the camps, and that some internally displaced persons have also been the victims of indiscriminate police shooting inside camps, in response to alleged rebel presence.

270. The description of killings found in the reports corresponds to the findings made by the Commission during its missions to the Sudan, through credible witness testimonies and investigations. It is impossible to describe in this report all the incidents of killings which the Commission has documented. However, a few cases are presented here which are characteristic of the pattern of killings noted by the Commission.

271. The Commission found that while all parties involved in the conflict have committed crimes against the civilian population, the Government of the Sudan and the Janjaweed bear responsibility for an overwhelming majority of the murders[124] of

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[124] The Commission uses "murder" and "killing" interchangeably. "Wilful killing" is the language used in the grave breaches provisions of the Geneva Conventions of 1949 (articles 50, 51, 130 and 147) and reproduced in the war crimes provisions (grave breaches) in the various statutes of

civilians committed during the conflict in Darfur. Furthermore, most of the civilians killed at the hands of the Government or the militias are, in a strikingly consistent manner, from the same tribes, namely Fur, Masalit, Zaghawa and, less frequently, other African tribes, in particular the Jebel and the Aranga in Western Darfur.

a. Killing in joint attacks by Government forces and Janjaweed

272. As an example of a case of mass killing of civilians documented by the Commission, the attack on Surra, a village with a population of over 1,700, east of Zalinguei, Southern Darfur, in January 2004, is revealing. Witnesses interviewed in separate groups gave a very credible, detailed and consistent account of the attack, in which more than 250 persons were killed, including women and a large number of children. An additional 30 people are missing. The Janjaweed and Government forces attacked jointly in the early hours of the morning. The military fired mortars at unarmed civilians. The Janjaweed were wearing camouflage military uniform and were shooting with rifles and machine guns. They entered the homes and killed the men. They gathered the women in the mosque. There were around 10 men hidden with the women. They found those men and killed them inside the mosque. They forced women to take off their *maxi* (large piece of clothing covering the entire body) and if they found that they were holding their young sons under them, they would kill the boys. The survivors fled the village and did not bury their dead.

273. The Commission was able to find various elements to corroborate witness accounts and confirm the occurrence of mass killings of civilians by Government forces and militias. For instance, the Commission visited Kailek, a village in Southern Darfur mainly populated by people belonging to the Fur tribe, and confirmed what eyewitnesses had told the Commission. This case illustrates not only the occurrence of mass killings of civilians, but also of wrongful confinement accompanied by summary executions, rape and other abuses. During the first attack described in the previous section, nine villages around Shataya, a town in the vicinity, were destroyed and 85 people were killed, including five women and three children. After the attack, the whole population of the area went to Kailek. There were still Janjaweed present in the surrounding villages, and people who attempted to return to those villages came under attack and some were killed. The Commission found elements to corroborate reports according to which 28 unarmed men who attempted to surrender themselves at the Kailek police station were all shot — only one man survived. In addition, 17 policemen were killed in this attack, all of whom belonged to African tribes.

274. A second attack occurred in March 2004. Government forces and Janjaweed attacked at around 3 p.m., supported by aircraft and military vehicles. Again,

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international criminal tribunals (see e.g. article 2 of the statute of the International Tribunal for the Former Yugoslavia; article 8 (2) (a) (i) of the Rome Statute). "Murder" is used in common article 3 of the Geneva Conventions and in the provisions of the various statutes of the international tribunals referring to war crimes other than grave breaches (serious violations of the laws and customs of war for the Yugoslavia Tribunal; violations of common article 3 for the International Criminal Court and the Rwanda Tribunal) and crimes against humanity (see articles 7 and 8 (2) (c) (i) of the Rome Statute; articles 3 and 4 of the statute of the Rwanda Tribunal, article 3 of the statute of the Yugoslavia Tribunal). In short, the International Tribunal for the Former Yugoslavia has held that the elements of the crime for murder and wilful killing are similar: *Kordić and Čerkez* (Trial Chamber), 26 February 2001, para. 233, confirmed by the Appeals Chamber on 17 December 2004, at para. 38, *Delalic*, para. 422.

villagers fled west to the mountains. Janjaweed on horses and camels commenced hunting the villagers down, while the military forces remained at the foot of the mountain. They shelled parts of the mountains with mortars, and machine-gunned people as well. People were shot when, suffering from thirst, they were forced to leave their hiding places to go to water points. There are consistent reports that some people who were captured and some of those who surrendered to the Janjaweed were summarily shot and killed. One woman claimed to have lost 17 family members on the mountain. Her sister and her child were shot by a Janjaweed at close range. People who surrendered or returned to Kailek were confined to a small open area against their will for a long period of time (possibly over 50 days). Many people were subjected to the most horrific treatment, and many were summarily executed. Men who were in confinement in Kailek were called out and shot in front of everyone or alternatively taken away and shot. Local community leaders in particular suffered this fate. There are reports of people being thrown on to fires to burn to death. There are reports that people were partially skinned or otherwise injured and left to die.

275. The case of Kailek is not isolated. It is similar to other incidents in which similar patterns are reported. For example, after months of consistent attacks of villages in the area, many persons gathered in Deleig after having fled their villages. In March 2004, Janjaweed and Government forces surrounded the town of Deleig, and then went from house to house looking for specific individuals. Many men were arrested and taken to the police station. They were separated into different groups and some were transported in a truck, allegedly to the Garsila area. The truck would come back empty and leave again with a new group of men. Most of those taken away were executed. According to highly reliable eyewitnesses, more than 120 men were killed, reportedly mainly intellectuals and leaders. This was another instance of a planned and organized joint attack by the Government forces and the Janjaweed, during which mass killings and summary executions were committed. The most recent such incident, although at a relatively smaller scale, occurred in Adwa in November 2004. The Commission does not consider it a coincidence that such brutal forms of killing have largely been committed against the Fur population.

276. The Commission considers that almost all of the hundreds of attacks that were conducted in Darfur by Janjaweed and Government forces involved the killing of civilians.

b. Killing in attacks by Janjaweed

277. Multiple killings have been committed by the Janjaweed during attacks. Several incidents of this nature were verified by the Commission. One attack in Molli in Western Darfur in April 2003 left 64 people dead including a seven-year-old girl. The dead are buried in eight multiple graves in the market area of the village. A significant fact noted by the Commission was that the incident was reported to the police and seven people were arrested, detained and eventually released three months later. The village of Nurei close to the town of Mornei in Western Darfur was attacked by Janjaweed and the Government forces in December 2003. This attack was supported by helicopter cover. Sixty-seven civilians were killed in deliberate and indiscriminate shooting by the assailants. All the houses in the village were burned. Bodies of the victims were buried in mass graves near the village. In another case, the Janjaweed attacked Mallaga village in October 2004. Eighteen men were killed and four men and two women injured. The Commission

verified the presence of two grave sites in the village — one said to contain the bodies of two men, and another with the bodies of seven men, all of whom died during the attack. In El Geneina the team also visited one of the areas used as a public cemetery, where according to witnesses nine victims of the attack on Mallaga were buried in a multiple grave, after the villagers brought the bodies to the town's hospital.

278. The Commission also notes that Janjaweed have, on a number of occasions, specifically targeted and killed children including in Kailek and Surra referred to above. The Commission received many reports of random and/or targeted killing of children, sometimes in horrific circumstances such as by burning or mutilation.

279. Several incidents of this nature were verified by the Commission. In short, the Commission has collected very substantial material and testimony which tend to confirm, in the context of attacks on villages, the killing of thousands of civilians.

c. Killing as a result of air bombardment

280. Other cases of killings are directly attributable to the armed forces of the Government of the Sudan, and especially killings caused by indiscriminate air attacks. For instance, the village of Amika Sara, Southern Darfur, was reportedly bombed by helicopter gunships, in an attack supported by Antonov aircraft and with ground support from Janjaweed, in October 2004. The site was visited on three occasions by the Commission. The evidence found was consistent with the testimony given by witnesses, according to whom 17 civilians were killed. The remains of rockets fired from helicopters were clearly identified. Crater analysis suggests that the helicopter attacks involved either multiple passes or multiple aircraft, or both. The Commission verified the presence of fresh graves in the area.

281. A further example of many such attacks documented by the Commission is the attack on Habila town in Western Darfur in August 2003 when six bombs were dropped by an Antonov aircraft on the town and the market, killing 30 civilians. The Commission's investigators verified witness testimonies, inspected sites showing evidence of bombardment, and saw graves where 27 of the 30 victims are buried. Habila is mainly populated by the Masalit tribe. The Commission found no evidence that there was any rebel activity or structures in the vicinity that could have been the target of this attack. The Government acknowledged the attack and offered to compensate the victims.

282. In another case investigated by the Commission and referred to in the previous section, Antonov aircraft bombed Anka village and the surroundings, in February 2004. After the bombing, Janjaweed attacked, destroying houses and looting property. As a result of the attack, 15 people were killed by shrapnel injury while others were wounded, houses were burned and property was lost. Some of the survivors now have physical disabilities as a result of their injuries.

283. On the basis of its investigations and the pattern of air attacks which it has established, the Commission is of the view that the military bears responsibility for a very large number of indiscriminate air attacks which resulted in the death of numerous civilians.

d. Killing following displacement

284. Civilians have also been killed after they have reached sites for internally displaced persons following displacement. On some occasions, they have been killed as they ventured out of the camp, either to go back to their village or for any other reason. For instance, different witnesses told the Commission of the recent killing of three persons who had left a camp in Kass to go and see their nearby village. The perpetrators were unidentified, but the people interviewed said they were "probably Janjaweed". They said that the militias stayed around the camps and the village in case anyone tried to return. In another instance in Kalma camp in Southern Darfur in November 2004, at a time when the Commission was present in Nyala, a number of internally displaced persons were reportedly killed and injured when police shot into the camp, allegedly in response to attacks from rebels hiding in the camp.

(ii) Killing by rebel groups

a. Killing of civilians

285. The Commission also has found that rebels have killed civilians, although the incidents and number of deaths have been few.

286. The Commission documented some rebel attacks and verified witness testimonies with thorough investigations in the field. For instance, the Commission has investigated a JEM attack on the town of Kulbus, Western Darfur, on 4 October 2003, and on 25 and 26 December 2003. During the first attack in Kulbus 42 soldiers and 17 male civilians including one child were killed. The Commission's forensic experts have been able to verify that some of the military were buried in the trenches which existed around the military camp, and all of the civilians were buried in multiple graves in the town cemetery. In a second attack on 25 and 26 December, 28 Government soldiers were killed, as well as 4 male civilians. Arguably, the town of Kulbus was a military target, evidenced by the military camp there. It would need further investigation to determine whether civilians were caught in crossfire, or whether they were attacked in an indiscriminate or disproportionate manner, or killed wilfully.

287. Those attacks were preceded by an attack described to the Commission by some eyewitnesses, where members of the nomadic Rizeigat tribe were attacked while in the Kulbus area by members of SLA and JEM. The attackers killed 48 persons including women and children and stole property and livestock from the market and then destroyed it. The victims were buried many days after the attack in areas surrounding Kulbus.

288. The Commission has been unable to confirm reports it has received, especially from the Government, concerning abductions, targeted killings and executions of civilians carried out by the rebels primarily because the rebels suspect them of being Government spies. While the Commission does not exclude that this may have happened, it has not been able to verify whether it did in fact occur.

b. Killing of humanitarian workers

289. The Commission was provided with a number of reports of incidents where humanitarian workers were the victims of attacks. Although the Commission was

not in a position to verify the identity of perpetrators itself in the course of its work, credible sources attributed most of those instances to the different groups of rebels. For instance, the new rebel movement NMRD is accused of an incident that occurred in October 2004 in Umm Baru, Northern Darfur, where two international workers were killed in a mine incident.

290. In another incident involving the same international humanitarian organization, two of its staff members working with a mobile health clinic were brutally killed while travelling in a clearly marked humanitarian convoy on the main road between Mershing and Duma in Southern Darfur. The circumstances of the killings remain unclear.

(b) Legal appraisal

291. As stated above murder contravenes the provisions of the International Covenant on Civil and Political Rights and of the African Charter on Human and Peoples' Rights, which protect the right to life and to not be arbitrarily deprived of life.[125] As for international humanitarian law, murder of civilians who do not take an active part in hostilities in an internal armed conflict is prohibited both by common article 3 of the 1949 Geneva Conventions and by the corresponding rule of customary international law, as codified in article 4 (2) (a) of Additional Protocol II. It is also criminalized either as a war crime or, depending upon the circumstances, as a crime against humanity, as proved by case law and by the statutes of the various international tribunals. It is crucial to stress again at this point that, when considering if the murder of civilians amounts to a war crime or crime against humanity, the presence of non-civilians does not deprive a population of its civilian character.[126] Therefore, even if it were proved that rebels were present in a village under attack, or that they generally used the civilian population as a "shield", nothing would justify the murder of civilians who do not take part in the hostilities.

292. A particular feature of the conflict in Darfur should be stressed. Although in certain instances victims of attacks have willingly admitted having been armed, it is important to recall that most tribes in Darfur possess weapons, which are often duly licensed, to defend their land and cattle. Even if it were the case that the civilians attacked possessed weapons, this would not necessarily be an indication that they were rebels, hence lawful targets of attack, or otherwise taking active part in the hostilities. In addition, it should be noted that the Government of the Sudan did not claim to have found weapons in the villages that were attacked. Furthermore, many attacks occurred at times when civilians were asleep, or praying, and were then not

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[125] Article 6(1) of the Covenant and article 4 of the African Charter. The Human Rights Committee held that this right is laid down in international norms that are peremptory in nature, or norms of *jus cogens* (General Comment 29, at para. 11). See CCPR/C/21/Rev.1/Add.11, 31 August 2001.

[126] *Akayesu* (International Criminal Tribunal for Rwanda Trial Chamber), 2 September 1998, para. 582: "Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character." See also *Rutaganda* (Trial Chamber), 6 December 1999, para. 72; *Musema* (Trial Chamber), 27 January 2000, para. 207. See also *Kayishema and Ruzindana* (Trial Chamber), 21 May 1999, para. 128: "[T]he targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population." See also *Bagilishema* (Trial Chamber), 7 June 2001, para. 79; *Semanza* (Trial Chamber), 15 May 2003, para. 330.

in a position to take a direct part in the hostilities. The mere presence of arms in a village is not sufficient to deprive civilians of their protected status as such.

293. In the light of the factual findings set out above, the Commission considers that there is a consistent and reliable body of material which tends to show that numerous murders of civilians not taking part in the hostilities were committed by both the Government of the Sudan and the Janjaweed. It is undeniable that mass killings occurred in Darfur and that the killings were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian population. The large number of killings, the apparent pattern of killing described above, including the targeting of persons belonging to African tribes and the participation of officials or authorities are among the factors that lead the Commission to the conclusion that killings were conducted in both a widespread and a systematic manner. The mass killing of civilians in Darfur is therefore likely to amount to a crime against humanity.

294. Considering the limits of its inherent functions, the Commission has been unable to assert with certainty the number of civilian victims in Darfur. The Commission leaves it to the competent court that will pronounce on these alleged crimes to determine whether the mass killings may amount to extermination as a crime against humanity.[127]

295. In addition, given the discriminatory character on political grounds of the systematic and widespread murder of civilians, these acts may very well amount to the crime of persecution as a crime against humanity. In *Zoran Kupreškić and others*. the Trial Chamber of the International Tribunal for the Former Yugoslavia defined persecution as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in article 5.[128] In article 7 (2) (g) of the Rome Statute persecution is defined as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. What is important to note here is that persecution can involve

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[127] Murder can amount to extermination as a crime against humanity. Extermination is primarily concerned with the mass destruction of a group of individuals, the emphasis being placed on the scale of the destruction, unlike murder which may comprise a singular incident. Extermination generally involves "the destruction of a numerically significant part of the population concerned". Although conceptually what differentiates murder and extermination is the element of mass killing involved in the latter, the perpetrator must not necessarily have committed mass killings himself, but must have been involved in the killings of civilians on a large scale. Furthermore, "extermination may be retained when the crime is directed against an entire group of individuals even though no discriminatory intent or intention to destroy the group as such on national, ethnic, racial or religious grounds has been demonstrated; or where the targeted population does not share any common national, ethnical, racial or religious characteristics". The perpetrator must however have "intended the killing" or was "reckless or grossly negligent as to whether the killing would result", and was "aware that his act(s) or omission(s) form[] part of a mass killing event". *Nahimana, Barayagwiza and Ngeze* (International Criminal Tribunal for Rwanda Trial Chamber), 3 December 2003, para. 1061; *Kayishema and Ruzindana* (Trial Chamber), 21 May 1999, note 8 to para. 645 and para. 144; *Krstić* (International Tribunal for the Former Yugoslavia Trial Chamber), 2 August 2001, para. 500; *Vasiljević* (Trial Chamber), 29 November 2002, paras. 228-229.

[128] See *Zoran Kupreškić and others*, International Tribunal for the Former Yugoslavia Trial Chamber, judgement of 14 January 2000, at para. 621.

the violation of a number of fundamental rights and that it must be committed on discriminatory grounds. The fact that the killings committed by the Government and the Janjaweed appear to have been systematically targeted against the Fur, Masalit, Zaghawa and other African tribes on political grounds is indicative of the discriminatory character of the killing and may thus amount to persecution as a crime against humanity.

296. As for the killing of civilians by the rebels, each individual violation must be considered as a very serious war crime. The Commission is, however, unable to conclude that they form part of a systematic or widespread attack against the civilian population.

3. Killing of detained enemy servicemen

(a) Factual findings

297. Some cases of death in detention were reported to the Commission by all parties, although those incidents are not thought to have occurred on a widespread basis. The Commission itself noted, inter alia, the events that occurred in Kailek and Deleig where Government forces and members of militias detained persons who they claimed were rebels hiding as civilians. Based on its substantial body of information on events in both places, the Commission notes, first, that very few, if any, of the thousands of people detained in Kailek and Deleig were rebels. Secondly, even if, as the Government alleges, the young men who were killed were indeed members of the rebel groups, their summary execution would contravene international law and the perpetrators should be held responsible for war crimes. As for killing of detained servicemen by the rebels, the Commission has received reports, especially from the Government, concerning executions of detained soldiers carried out by the rebels. Such executions would constitute war crimes, but the Commission has not received independent information to corroborate reports received.

(b) Legal appraisal

298. International humanitarian law prohibits ill-treatment of detained enemy combatants, in particular violence to life and person, including murder of all kinds (see common article 3 (1) (a) of the Geneva Conventions). It also specifically prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples (see article 3 (1) (d) of the Geneva Conventions). Wilful killing of a detained combatant amounts to a war crime.

4. Killing of wounded enemy servicemen

(a) Factual findings

299. While there have been allegations of murder of wounded soldiers, very few cases were in fact brought to the attention of the Commission and it was unable to verify these reports.

(b) Legal appraisal

300. The wilful killing of wounded servicemen is strictly prohibited by international humanitarian law (see article 23 (b) and (c) of the Hague Regulations and common article 3 (1) (a) of the Geneva Conventions). It amounts to a war crime.

5. Wanton destruction of villages or devastation not justified by military necessity

(a) Factual findings

(i) Destruction by armed forces and Janjaweed

301. The Commission has received and examined a great number of reports which document both the systematic and widespread destruction of entire villages and hamlets in the three States of Darfur. A number of reports have presented satellite imagery clearly documenting this widespread destruction. Some reports estimate that more than 600 villages and hamlets have been completely destroyed, while an additional 100 to 200 villages have been partially destroyed. Other sources, based on Sudanese police reports, indicate that more than 2,000 villages were destroyed. As noted above, the destruction of villages has been irrefutably established and is clearly acknowledged by the Government of the Sudan.

302. The Commission examined detailed reports of the destruction of almost 140 villages in the three States of Darfur. While some reports have noted a few incidents of destruction of villages and private property committed by the rebel groups, most of the reports contain witness accounts indicating that the majority of villages were destroyed during attacks by Janjaweed, often under the direction and with the participation and the support of the armed forces of the Government of the Sudan.

303. There are many incidents reported in which Government forces are said to have surrounded villages and stood guard as the Janjaweed burned and pillaged and committed other atrocities against the population. Many villages are said to have been attacked more than once, until they were completely destroyed.

304. Many reports also note that villages were burned even after they had been abandoned by the inhabitants who fled to camps for the internally displaced persons in larger urban centres in Darfur, or to neighbouring Chad. This has led many observers to fear that this is a part of the policy executed through the Janjaweed to expel the population from the targeted areas and to prevent the immediate or, possibly, long-term return of the inhabitants. This concern is expressed because the villages reported to have been burned and destroyed in this manner are almost exclusively inhabited by African tribes, mostly Fur, Masalit and Zaghawa.

305. Many of the villages were reportedly completely destroyed by deliberate demolition of structures and more frequently by burning down the whole village. Straw roofs of the traditional circular houses were torched, as well as all other inflammable material, and vegetation inside and in the immediate vicinity of the village was destroyed by burning. Some of these villages had hundreds of homes that were torched and burned to the ground. During the attacks Janjaweed are reported to have destroyed utensils, equipment for processing food, water containers and other household items essential for the survival of the inhabitants. Wells were reportedly poisoned by dropping the carcasses of cattle into the wells. In addition,

as noted below, the destruction seems to have been consistently combined with looting of personal valuables, cash and, above all, livestock.

306. The Commission witnessed at first hand the extensive nature of the destruction, and subsequently carried out detailed fact-finding at several sites in all three States of Darfur to verify and establish acts that resulted in the destruction, the methods employed, the forces responsible and the patterns that indicate the intent behind the acts.

307. The Commission found that the witness testimonies previously reported were in conformity with what was discovered as a result of its own inquiries and investigations. It can be confirmed that most destruction has been caused by the Janjaweed with the support of the Government of the Sudan.

308. The trends and patterns are best illustrated in the case of Western Darfur where the widespread destruction is most visible. The Commission found 35 destroyed villages in only four localities (El Geneina, Habila, Kulbus and Wadi Saleh). These are only a small number of the scores that are reported to have been destroyed in the same area and are in addition to the ones that were damaged as a result of aerial strikes by Government forces that the Commission has verified.

309. Of these 13 were destroyed in raids by the Janjaweed and 18 in combined attacks by Government forces and the Janjaweed, who were wearing uniforms similar to those of the military. The manner of destruction of most villages seems to follow a clear systematic pattern. Most of the destruction was carried out by Janjaweed who set entire villages afire and destroyed any private property which was not looted. Often the armed forces of the Government of the Sudan were present, either in aircraft or in vehicles outside the village, but did not, except in a few cases, take part in the actual destruction, unless destruction was caused by aerial bombardment.

310. From the material collected it is evident that the majority of the destroyed or damaged villages belong to either the Masalit, the Zaghawa, the Fur, or other African tribes. In Western Darfur, for instance, of the 35 completely or partially destroyed villages investigated by the Commission, 31 belonged to African tribes who had clearly been systematically targeted, while the remaining 4 belonged to two Arab tribes who had been attacked by either JEM or SLA. This is further illustrated by the fact that most other tribes have not been targeted in this way, if targeted at all. The Commission observed, for instance, that in an area of 50 km between El Geneina and Masteri inhabited mostly by Arab tribes, no signs of destruction were recorded. Similar patterns have been noted in Northern and Southern Darfur in areas where there is a concentration of Zaghawa and Fur populations, whose villages had been targeted.

311. The Commission heard credible accounts showing that the acts of destruction were wanton and deliberate, and that in addition to homes all essential structures and implements for the survival of the population were destroyed. Oil presses, flour mills, water sources such as wells and pumps, crops and vegetation and almost all household utensils were found scorched or smashed at the sites inspected by the Commission team. The Commission has also noted the destruction of schools, health centres, markets and other civilian objects.

312. Such a pattern of destruction can only be interpreted as having the objective of driving out the population through violence and preventing their return by

destroying all means of survival and livelihood. The Commission has also verified that a number of villages previously inhabited by the Fur in Southern Darfur and the Masalit in Western Darfur are now being populated by Arab tribes.

313. The Commission did not find any evidence of military activity by the rebels in the major areas of destruction that could in any way justify the attacks on military grounds.

314. In some instances, such as around Kornoi and Tine in the northern parts of Western Darfur and some parts of Northern Darfur, destruction is mainly linked to aerial bombardment, but has been only partial, with only a few structures destroyed.

315. In conclusion, the Commission finds that there is large-scale destruction of villages in all three States of Darfur. This destruction has been deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government forces may not have participated directly in the destruction, their complicity in the attacks during which the destruction was carried out and their presence at the scene are sufficient to make them jointly responsible. The destruction was targeted at the areas of habitation of African tribes, in particular the Fur, Zaghawa and Masalit. There was no military necessity for the destruction and devastation caused as a joint venture by the Janjaweed and the Government forces. The targets of destruction during the attacks under discussion were exclusively civilian objects; and objects indispensable to the survival of civilian population were deliberately and wantonly destroyed.

(ii) *Destruction by rebels*

316. In addition, the Commission has recorded incidents in Northern Darfur in which SLA is reported to have burned houses as well as a police station during its attacks on the towns of Tawila and Korma.

317. The Commission found no information or evidence which would indicate that the rebel groups are responsible for causing widespread destruction. However, there are a few incidents in which they have destroyed houses and buildings in towns and villages. This is particularly notable in the JEM attacks on Kulbus town in Western Darfur, and villages in this locality between October and December 2003. The Commission has heard credible testimony describing the partial destruction of a school, the hospital and the market, deliberately inflicted by the rebel group during the attack on the town. There are also credible accounts of the destruction of at least one village in the locality.

(b) Legal appraisal

318. Article 11 of the International Covenant on Economic, Social and Cultural Rights provides, inter alia, that the States Parties to the Covenant recognize the right of everyone to adequate food, clothing and housing.[129] Furthermore, customary international law prohibits and criminalizes the destruction of the property of a hostile party carried out by a belligerent in the course of an international or internal armed conflict, and not justified by military need.

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[129] Committee on Economic, Social and Cultural Rights, General Comment 4 on the right to adequate housing, of 13 December 1991, and General Comment 7, on the right to adequate housing (article 11.1 of the Covenant): Forced evictions, of 20 May 1997.

319. It is apparent that the massive destruction of villages by the Government forces and the Janjaweed was not justified by military necessity. Those villages were inhabited by civilians and, if some rebels were living there or taking shelter in some homes, it was not warranted to destroy the whole village by setting it afire. The destruction of so many civilian villages thus amounts to a very serious war crime.

320. In addition to constituting a war crime,[130] destruction of property, if part of a systematic or widespread attack on part of the civilian population, may amount to the crime of persecution as a crime against humanity if carried out on discriminatory grounds. However, not all destruction of property per se amounts to persecution. It must further be established that the destruction of property will have a detrimental effect on the liberty and livelihood of those people in that area. As a Trial Chamber of the International Tribunal for the Former Yugoslavia held in *Zoran Kupreškić and others*,[131] such destruction should be akin to the same inhumane consequences as a forced transfer or deportation. Another Trial Chamber of the Tribunal held in *Blaškić* that the destruction of property must be construed to mean the destruction of towns, villages and other public or private property not justified by military necessity and carried out unlawfully, wantonly and discriminatorily.[132]

321. The destruction of property in Darfur was clearly part of a systematic and widespread attack on the civilian population; it clearly had a detrimental effect on the liberty and livelihood of those people, being deprived of all necessities of life in the villages; and it almost consistently involved the forced displacement of persons. The destruction was clearly carried out "unlawfully and wantonly", and the fact that the vast majority of villages destroyed belonged to African tribes would also indicate that it is carried out "discriminatorily". In view of these facts, the Commission is led to the conclusion that this destruction may well amount to the crime of persecution, as a crime against humanity.

6. Forcible transfer of civilian populations

(a) Factual findings

322. As noted above, the displacement of a very large part of the population of Darfur is a fact beyond dispute. All reports examined by the Commission agree that the displacement has been forced and widespread, affecting more than 1.85 million persons (1.65 million internally displaced persons in Darfur, and more than 200,000 refugees in Chad).[133] The magnitude of displacement caused at the outset of the crisis is still problematic to determine, as there were practically no assessments or estimates carried out, since there were no humanitarian organizations present in Darfur to conduct such an estimate, nor did the Government put forward figures. Humanitarian access was also seriously hampered until mid-2004 when the Government finally agreed to a more flexible and expeditious procedure for granting access to humanitarian workers. Most reports argue that the displacement has been a

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[130] See, e.g., *Kordic and Čerkez* (International Tribunal for the Former Yugoslavia Trial Chamber), 26 February 2001, paras. 346-347.

[131] Judgement of 14 January 2000, para. 631 (see also para. 621).

[132] *Blaškić* judgement of 3 March 2000, para. 234.

[133] *Darfur Humanitarian Profile, No. 8*, November 2004, available at http://www.unsudanig.org. UNHCR refugee statistics provided by UNHCR Chad.

major feature and, it would appear, even an objective for some actors during the conflict.

323. Most official United Nations reports note that the number of displaced persons grew quite dramatically over a relatively short period. For instance, as noted above, the Office of the Deputy Special Representative of the Secretary-General for the Sudan and United Nations Resident and Humanitarian Coordinator, in its *Humanitarian Profile* of November 2004, noted that the total number of internally displaced persons exceeded 1.65 million persons. However when the United Nations first began to estimate the number of displaced in September 2003, the number was less than 300,000.[134]

324. The Commission and its team witnessed ample evidence of the displacement and conducted a great number of interviews with both internally displaced persons in Darfur and refugees in Chad. In Southern Darfur the teams visited displaced persons in Kalma camp, Otash, Zalinguei, Kass and other sites. In Northern Darfur the teams interviewed displaced persons in Abu Shouk, Zam Zam and Fato Borno camps near El Fashir, as well as displaced persons in Kutum. The Western Darfur team interviewed refuges across the border in Chad, including in the Bredjing camps, and also spoke to displaced persons in Mornei and Masteri.

325. As noted in the sections on attacks, killings and destruction above, the Commission found that most of the internal displacement as well as the displacement to Chad occurred as a direct result of attacks by Janjaweed and/or Government forces. Following the destruction of their villages, and also as a result of direct threats and other violations committed by the attackers, the villagers decided to leave their homes to seek security in large urban areas inside Darfur, or across the border in Chad. Others fled out of fear of attacks, since they had received information about atrocities in the vicinity. Practically all of the displaced had been unable to return to their villages because of continued insecurity caused by threats from and presence of Janjaweed. The Commission was able to confirm that in the area between Kulbus and Tine most of the villages were deserted, the original inhabitants having fled to Chad or other areas inside the country. Only a few settlements were still inhabited, but by nomadic herders who were observed to be settled around or in the villages. The presence of the herders was also noticed by the Commission around the otherwise deserted villages around Sirba and Abu Surug in Western Darfur. The Commission spoke to some displaced persons who had sought to return but had again faced attacks.

326. A typical account involving displacement and the inability to return because of continued threat from the Janjaweed is represented by the following interview with a refugee, a member of the Masalit tribe, in Chad, originally from a village in the Masteri area:

> The village was attacked by Government soldiers and Janjaweed in October 2003. It was a Wednesday and fifth or sixth day of Ramadan. Women had gone to fetch water and at about 7 a.m. I saw people approaching the village. It was Government soldiers and Arabs coming on horses and cars. There was a plane behind these people. There were about 200 people with guns. They were shouting "This is not your land", and were hitting the children with whips. I ran towards my cow and untied it. One of the attackers, who was wearing

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[134] *Darfur Humanitarian Profile*, No. 8, November 2004.

> khaki, saw me from the hillock on which he was standing and shot me. I was wounded in the groin and ran and hid in the cow shed. I came out only after they had left about 15 or 20 minutes later. People were fleeing from the village. Some people carried me with them to Masteri, where I was treated in the hospital for my injury. I was later told that my father and younger brother had been killed. Four other people were also killed. I was also told that the soldiers and Janjaweed had looted all the cattle and livestock. Fifteen days later some people went back to the village, but the Arabs were still around the village. If they saw anyone they whipped the women and killed the men. We first stayed near an IDP Camp in Masteri, and after three months I crossed over to Chad. There were people from 20 villages in the place where we stayed before coming to the Sudan.

327. The Commission also found that, following displacement, the internally displaced persons who remained inside Darfur were still faced with a number of threats and largely confined to the camps or urban areas, since venturing outside would involve risks of attacks and other violations, in particular rape, as described below.

328. With regard to specific patterns in the displacement, the Commission notes that it appears that one of the objectives of the displacement was linked to the counter-insurgency policy of the Government, namely to remove the actual or potential support base of the rebels. The displaced population belongs predominantly to the three tribes known to make up the majority in the rebel movements, namely, the Masalit, the Zaghawa and the Fur, who appear to have been systematically targeted and forced off their lands. The areas of origin of the displaced coincide with the traditional homelands of the three tribes, while it is also apparent that other tribes have practically not been affected at all.

329. At the same time, it seems possible that the Janjaweed, who are composed of tribes traditionally opposing the three displaced tribes, also benefited from this displacement as they would gain access to land. The Commission found evidence indicating that Arab tribes had begun to settle in areas previously inhabited by the displaced, thus further preventing an eventual return of the displaced.

(b) Legal appraisal

330. Under article 12 of the International Covenant on Civil and Political Rights, everyone lawfully within the territory of a State shall, within that territory, have the freedom to choose his residence. This provision thus protects freedom of movement and the right not to be displaced arbitrarily. The Human Rights Committee has clearly enunciated this right in its General Comment 27.[135] On several occasions the Committee on Economic, Social and Cultural Rights has stated that forced evictions are prima facie incompatible with the requirements of the Covenant on Economic, Social and Cultural Rights.[136]

331. International customary law prohibits the forcible transfer of civilian populations both in time of peace and in time of war. As clarified in article 7 (2) (d)

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[135] See Human Rights Committee, General Comment 27 of 2 November 1999 (CCPR/C/21/Rev.1/Add.9).

[136] General Comment 7, on the right to adequate housing (article 11.1 of the Covenant): Forced evictions, of 20 May 1997.

of the Statute of the International Criminal Court, which may be held to codify customary international law on the matter, deportation or forcible transfer of population means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. The forced dislodgement of civilians from the area where they traditionally and legally live, resulting from unlawful indiscriminate attacks on their dwellings and the scorching of their villages, falls within the scope of the prohibition at issue.

332. Given the systematic and widespread character of the forced displacement of persons in Darfur, the Commission finds that such action may well amount to a crime against humanity. The requisite subjective element (awareness of the systematic nature of the forced displacement) would be inherent in the fact that such displacement clearly amounted to a Government policy consistently pursued by the relevant Government authorities and the Janjaweed. Furthermore, given the discriminatory character of the displacement, these actions would amount to the crime of persecution as a crime against humanity.

7. Rape and other forms of sexual violence

(a) Factual findings

333. Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three States of Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called "slaves" or *Torabora*.

334. The following patterns have been reported: First, deliberate aggressions against women and girls, including gang rapes, occurred during the attacks on the villages. Second, women and girls were abducted, held in confinement for several days and repeatedly raped during that time. Third, rape and other forms of sexual violence continued during flight and further displacement, including when women left towns and for displaced persons sites to collect wood or water. In certain areas, rapes also occurred inside towns. Some women and girls became pregnant as a result of rape.

335. In most of the cases, the involvement of Janjaweed was reported. In many cases, the involvement of soldiers was also alleged. There were few cases reported of rebels committing rape and sexual violence.

336. In general, the findings of the Commission confirmed the patterns reported above. However, the Commission considers that it is likely that many cases went unreported owing to the sensitivity of the issue and the stigma associated with rape. On their part, the authorities failed to address the allegations of rape adequately or effectively.

(i) *Rape and other forms of sexual violence committed by the Janjaweed and/or Government soldiers*

a. Rape and other forms of sexual violence during attacks on villages

337. According to the information reported by various organizations, there were cases of rape and sexual violence during attacks on villages. In Southern Darfur, during the two-month period from August to September 2004, of 120 victims of rape treated by medical professionals, at least 100 cases occurred during attacks on the victim's villages. In a survey conducted in the Mornei camp in Western Darfur, medical teams treated around 20 victims of sexual violence from April to June 2004. Most of the cases reportedly occurred during attacks on villages. Further cases of rape were reported during the Government and Janjaweed attacks on Tawila and its surrounding villages during the first half of 2004. During March 2004 attacks by the Government troops and Janjaweed on Korma, Northern Darfur, more than 20 women and young girls were reportedly raped. Further rapes of women were reported during attacks around Miski, Disa and Umm Baru in Northern Darfur; and Azeoni, Kornoi, Nertete, and Mukjar in Western Darfur. It has been also reported that 18 women were raped during the attack on Adwa, Southern Darfur, at the beginning of December 2004. There are reports that women and girls continue to be subject to sexual violence during attacks on their villages, including the report of a recent attack on Hamada on 13 January 2005 in which women were subjected to rape.

338. The findings of the Commission confirm that rape and sexual abuse were perpetrated during attacks by Janjaweed and soldiers. This included the joint attacks by Government soldiers and Janjaweed attacks on Dobo, Northern Darfur, around March 2004; Badi, Northern Darfur, around February 2004; and Adwa, Southern Darfur, in December 2004. It further includes attacks by soldiers on Kalokitting village, Southern Darfur, and on villages in the Wadi Saleh area of Western Darfur around August 2004, as well as attacks by Janjaweed on Mongue, Northern Darfur, around August 2004; Gukor, Western Darfur at the end of 2004; Kolonga, Western Darfur, around March 2004; Goz Badeen, Western Darfur, around August 2003; Umm Naima, Western Darfur, in July 2003; and Nabagai, in Southern Darfur, around March 2004. The Commission interviewed several victims and eyewitnesses who confirmed that during the attacks on Tawila and its surrounding villages in Northern Darfur, in February and March 2004, rape and other forms of sexual violence committed by Janjaweed were prevalent. The Commission spoke with several victims and eyewitnesses, and conducted on-site examinations which confirmed that many girls were raped by Janjaweed during the attack on Tawila boarding school. The Commission also found that women were gang-raped in public following the joint attack by Government soldiers and Janjaweed on Kanjew village, Western Darfur, in January 2004. In another case, the Commission found that the Janjaweed raped five girls in public during the attack on Abdeika, in Western Darfur, in October 2003.

Case study: attack on a school in Tawila, Northern Darfur

339. One of the victims of rape during the attack on a boarding school in February 2004, a young girl, told the Commission:

> At about 6 in the morning, a large number of Janjaweed attacked the school. She knew that they were Janjaweed because of their "red skin", a term she used for Arabs. They were wearing camouflage Government uniforms. They arrived in a pickup truck of the same colour as the uniforms they were wearing. On the day before, she noticed that the Government soldiers had moved into position to surround the school. When they attacked the boarding house, they pointed their guns at the girls and forced them to strip naked, took their money, valuables and all of their bedding. There were around 110 girls at the boarding school. All the events occurred in the sleeping quarters of the school.
>
> The victim was taken from the group, blindfolded, pushed down to the ground on her back and raped. She was held by her arms and legs. Her legs were forced and held apart. She was raped twice. She confirmed that penetration occurred. The rape lasted for about one hour. Nothing was said by the perpetrators during the rape. She heard other girls screaming and thought that they were also being raped. After the rape, the Janjaweed started burning and looting. (She confirmed the presence of the military in the area, as she had seen military helicopters used by the army on the same day.)
>
> The victim became pregnant as a result of this rape and later gave birth to a child.

Case study: attack on Terga, Western Darfur

340. The Commission interviewed another victim who provided information about multiple rapes of women during an attack on Terga, Western Darfur. This was how she described the attack and what followed:

> The village of Terga was attacked in January 2003. An aircraft bombed the village and then about 40 cars and men on horses arrived. They covered the entire area around Terga. The attackers in the cars and on the horses were shooting the villagers. They were stealing from the houses. Four young boys were executed in front of the villagers. The attack was conducted mainly by the military. The Arab people did the stealing. Soldiers also committed rapes together with the Janjaweed.
>
> When the attack occurred, the women ran to a wadi, where the army surrounded them. The victim stated that she knew 19 of the women who were raped but that there were many more. She believed there were around 50 in total. The young girls were raped first. The victim was raped by nine men. Other women were also raped by many men. The women were kept for six days at the wadi.

b. Abductions and sexual slavery

341. Other sources reported that women and girls were abducted, held in confinement for several days and repeatedly raped by Janjaweed and soldiers in villages under attack, military camps and hideouts. Further, torture was reportedly used to prevent women from escaping. In March 2004, Janjaweed and 150 soldiers reportedly abducted and raped 16 young girls in Kutum, Northern Darfur. During the attacks on Tawila and its surrounding villages in Northern Darfur in February 2004, around 35 female students were allegedly abducted and raped by Janjaweed.

Further abductions of women were reported in the area surrounding El Geneina, Western Darfur. Alarming reports were received of mass rape and sexual violence against women and girls who were confined in Mukjar, Western Darfur, and Kailek, in Southern Darfur. Additional abductions and rape of women were reported, amongst others, in the surroundings of Disa and Silea in Western Darfur.

342. The Commission's findings confirmed the pattern reported above. For instance, the Commission found that women who went to market or were in search of water in Tarne, Northern Darfur, were abducted, held for two to three days and raped by members of the military around March 2003. Notably, the Government of the Sudan had established a large military camp in the vicinity. During the Janjaweed attack on Mengarassa village, in Western Darfur, in November 2003, 20 girls were abducted and taken to the Ammar camp. The Commission further found that 21 women were abducted during the joint Government armed forces and Janjaweed attack on Kanjew, Western Darfur, in January 2004. The women were held for three months by Janjaweed and some of them became pregnant as a result of rape during their confinement. During the attack on Mallaga village, Western Darfur, in October 2004, the Janjaweed abducted four girls, one of them only 12 years old. The girls were held for three days, raped and then released. Women were also abducted and raped in three Janjaweed camps following the attacks on Korma, Northern Darfur, in March 2003. The Commission also confirmed that following the attack on Tawila in February 2004 a group of around 30 female students was abducted by Janjaweed and held in an encampment where they were repeatedly raped. Several other women from villages surrounding Tawila were also brought to this camp by the Janjaweed after their abduction following attacks on their villages.

Case study: Kailek, Southern Darfur

343. The Commission interviewed several eyewitnesses who confirmed that, following the joint attacks by Government soldiers and Janjaweed in the area, up to 30,000 people were confined in Kailek, Southern Darfur, for about 50 days. Women and children were separated from the men, confined in an area around the mosque, and later taken away by their captors to be raped. They were subjected to gang rapes which lasted for protracted periods of time. Girls as young as 10 years old were raped.

344. One of the female witnesses described the terror of confinement in the area designated by captors for women and children in Kailek as follows:

> "We stayed in one place, we were not allowed to move around. The old women were allowed to go and get water, and also to go and get food. We were forced to urinate in front of everybody. We were afraid to use the toilet at night because we were surrounded by the attackers, and they were on the look-out for women to rape."
>
> After being raped, some of the women did not have their clothes returned to them and they were forced to remain naked. An independent source, who witnessed the situation in Kailek, told the Commission: "There were more than 80 cases of rape reported to us by the women and children kept in the walled area. We also found four women with no clothes. They covered themselves with a grass mat and were imploring us not to remove it. They said that if they needed water or food, one of them had to borrow clothes from the other women to go and fetch water or food."

> Anyone who attempted to assist the victims was either beaten or killed. On one occasion, a husband attempted to assist his wife. He was so severely beaten that he is now permanently paralysed and is in Khartoum hospital. These testimonies are fully corroborated by the entire body of material collected by the Commission, including information obtained through independent observers who witnessed the situation of the women in Kailek.

Case study: Wadi Tina, Northern Darfur

345. The Commission interviewed a victim who described how she and her six sisters were abducted and held in confinement at the Janjaweed camp in Wadi Tina, after the attack on Tawila and the surrounding villages. The victim, who has been raped 14 times over the period of one week, provided the following information:

> At about 6 in the morning on 7 January 2003, she was at her home in the village of Tarne. Around 3,000 Janjaweed riding horses and camels attacked the village. Some of them were in vehicles. Some were wearing khaki uniforms and some were wearing civilian clothing with white scarves on their heads. There were around 50 Land Cruisers and pickup vehicles. All of the vehicles had guns on them. The men on the vehicles were wearing army uniforms. They were wearing the same uniforms as the Janjaweed were wearing. They were soldiers of the Sudanese army.
>
> The victim saw women were being taken, people being killed, cattle being stolen, and food being burned. She further described the following: "Ten Janjaweed came into my house. They took me and my six sisters who were 15, 16, 17, 19, 20 and 24 years old. They said 'why are you staying here, you slaves'. We did not reply. They were armed and all of them were pointing their guns at us. While they were in our house, they shot my two brothers. They took us outside and beat us with the leather straps which they use to control the camels. The beating lasted for 20 minutes.
>
> "After being beaten, we were taken to Wadi Tina. They made us walk while they rode their camels. It took us three hours to get there. During this time they beat us and threatened to kill us. When we arrived at Wadi Tina, I saw at least 95 women there. We were left in the wadi with a large group of women and were guarded by at least 100 armed Janjaweed. All the women were naked. Soon after our arrival we were forced at gun point to take off our clothing.
>
> "Around 8 in the morning on the second day at the wadi, I was raped for the first time. A very large group of Janjaweed arrived at the wadi. They selected a woman each and raped them. Over a period of a week, I was raped 14 times by different Janjaweed. I told them to stop. They said 'you are women of *Torabora* and we will not stop this'. We were called slaves and frequently beaten with leather straps, punched and slapped. I feared for my life if I do not have sex with them. We were humiliated in front of other women and were forced to have sex in front of them. Other Janjaweed were watching."
>
> After a week, she was released with four other girls and went back to Tarna village. She has not seen her sisters since. She did not know the identity of any other women at the wadi but stated that three women died there as a result of being raped. The victim did not know the identity of the perpetrators.

c. Rape and other forms of sexual violence during flight and further displacement

346. Rape and other forms of sexual abuse were widely reported to continue during flight and further displacement, including outside as well as inside of various displaced person sites. The impact of the violence committed outside those sites is exacerbated by the fact that women and their families depended on the collection of firewood for their livelihood and survival. In most of the cases, it was the women and girls who went outside the camps to search for firewood and water, since they had a better chance to survive attacks than the men and boys who risked being killed. According to one report, a family from Magarsa, Western Darfur, abandoned their house in February 2004 because of the conflict. The father of the family stated that, during the attempt to flee from their home, they had encountered six Arab men who raped his 25-year-old daughter in front of him, his wife and the young children. He was unable to defend his daughter as the men threatened him with a weapon. According to another report, two women were reportedly raped in the displaced persons camp in Kassab, Northern Darfur, in June 2004. In April 2004, a group of 40 displaced women went to collect wood outside of Mukjar, Western Darfur and was reportedly attacked by six armed Janjaweed. Some women were badly beaten and at least one woman was raped by four Janjaweed. During the first week of July 2004, a medical team in Mukjar treated 15 women for serious injuries sustained in eight separate incidents. In two of the incidents, beatings were followed by rape. On 22 July 2004, around 13 women were reportedly raped by Janjaweed when searching for firewood around the displaced persons camp near Kass, Southern Darfur. In July 2004, around 20 women were reportedly raped by Janjaweed when searching for firewood around the Sisi camp, Western Darfur. Further rapes of women venturing outside displaced person locations, such as Abu Shouk in Northern Darfur, Ardamata, Azeoni, Garsila, Mornei, Krinding and Riyadh in Western Darfur, and Al Jeer, Derej, Kalma, Kass and Otash in Southern Darfur have been reported.

347. The Commission's findings confirmed that rape and sexual violence continue to be perpetrated against women and girls during flight and in areas of displacement. Cases of rape by Janjaweed and Government soldiers surrounding sites for displaced persons have occurred in sufficient numbers to instil fear of such incidents among women and girls, and has led to their virtual confinement inside those sites. The Commission interviewed victims who had been raped and sexually abused outside the Abu Shouk and Zam Zam camps in Northern Darfur, Habila, Krinding, Masteri, Mornei and Sisi camps in Western Darfur, and Kalma and Derej camps in Southern Darfur.

348. In one instance, the Commission interviewed two young girls, 12 and 14 years old, who had gone to collect wood with another five children in November 2004 outside the Abu Shouk camp. The soldiers raped the two girls, called the children daughters and sons of *tora bora*, beat the other children and threatened to kill them. Following the incident, the children went to complain to a nearby military camp and described the perpetrators. The two girls went for a medical examination in the El Fashir hospital and an official complaint was submitted to the local police. The initial response of the local authorities was inadequate. Upon the insistence of the Commission, the local police investigated the incident and informed the Commission that nine suspects had been detained and that the case was currently with a prosecutor. Furthermore, the Commission found that there was a prevalent sense of insecurity among the internally displaced persons in Kabkabiya, Northern

Darfur. In particular, the women and girls collecting firewood feared leaving Kabkabiya as they had been subjected to rape and sexual violence by the Janjaweed. Even if the incidents had been reported to the police, the perpetrators appeared to enjoy impunity and the attacks against women continued. The Commission also interviewed four young women who related two incidents that occurred in June 2004 during which they were detained on the road from the Kutum market, Northern Darfur, while they were returning to their villages. In each incident, women were forced to strip at gunpoint, raped by Janjaweed and later were left naked on the road. The circumstances of the crime indicate that the same perpetrators committed the crimes.

Case study: flight from Kalokitting, Southern Darfur

349. The Commission interviewed several eyewitnesses in relation to rapes of three women, one of whom was killed, while fleeing the attack on their village, Kalokitting in Southern Darfur, around March 2004. The Commission received the following information regarding this incident:

> The village was attacked around 4 in the morning. Men with weapons, wearing khaki and covering their faces, entered houses. There were many weapons, including Kalashnikov, DShK, and G-3, as well as green vehicles. The army was there and everybody was wearing khaki. There were around two to three white and green aircraft, which came very low. One white plane was attacking. One of the victims stated as follows: "It was around 4 a.m. when I heard the shooting. Three of us ran together. We were neighbours. Then we realized that we did not bring our gold. When we returned, we saw soldiers. They said stop, stop. They were several. The first gave his weapon to his friend and said to me to lie down. He pulled me and threw me on the floor. He took off his trousers. He ripped my dress and there was one person holding my hands. Then he 'entered' [a word for intercourse]. Then the second 'entered', and the third 'entered'. I could not stand afterwards. There was another girl. When he said lie down, she said no. Kill me. She was young. She was a virgin. She was engaged. He killed her." The third woman who was also there stated that she was raped in the same way.

Case study: outside the Zam Zam camp, Northern Darfur

350. The Commission also interviewed eyewitnesses of another incident that involved groups of women who went to sell firewood in the market in El Fashir around October 2004. The Commission obtained the following information:

> Three separate groups of women were returning in the evening from El Fashir to the Zam Zam camp in Northern Darfur. One witness was in the first group, which was stopped at a checkpoint outside El Fashir, held there for some time, and then allowed to proceed. The witness left with her group which included four other women and two children, and headed towards the Zam Zam camp. Approximately 2 km after the checkpoint, around 20 soldiers dressed in camouflage uniforms drove up to the group of women and ordered them to stop, while firing some gunshots. The women were told to get down off their donkeys and lie on the ground. The witness was holding her sister-in-law's one-year-old child who started to cry. One of the soldiers grabbed the child and threw it away on the side of the road. When one of the older women in the

> group asked the soldier why did he do that, he kicked her in the head. Other soldiers started to beat the other four women, including the witness. Some soldiers held one of the other women down and started raping her. At the same time, the witness was held down on the ground by soldiers who also pulled her clothing over her head. Four soldiers then had vaginal intercourse with her, one after the other. At the time this was occurring, one of the soldiers said: "You are the women of the war". The other three women, including the older one, were also raped in this incident. The soldiers were about finished raping the five women, when the second group of women who went to El Fashir to sell wood arrived at the same location. The first group of women was allowed to leave. The witness heard that the women in the second group were also raped.

Case study: outside the Krinding camp, Western Darfur

351. The Commission interviewed two sisters who were raped while cutting firewood in Griri, outside the Krinding camp for displaced persons in Western Darfur, around September 2004. The Commission obtained the following credible information:

> Three months before Ramadan, a group of women, three of them young, were cutting firewood in Griri, outside the Krinding camp where they have been living for the past 10 months. Around 11 a.m., four Arab men came to them and told them to sit down. The older man was wearing khaki and three younger men were wearing djellabas. The older men hit the witness, who is 17 years old, six times on her back and eight times on her legs. She still had marks from the incident [which were verified by the Commission]. The older man then took the witness away from the other girls and raped her. The three young men were raping other girls. The witness stated the following: "He took off only my underwear. He took his penis out of his pants. He did not say anything, he just kept beating me while he raped me. After I was so hurt and tired, I could not move and others took me to the doctor in Geneina big hospital. I was bleeding a little. The doctor did a report that I was raped. He also told me that I have something broken inside. My 8-year-old sister was also with me that day and was also raped but not beaten. I have injuries on my back and leg."

352. In conclusion, while the Commission was not in a position to ascertain the precise number of rapes perpetrated, it found that a sufficient number of such crimes have been committed during the attacks and in the aftermath of the attacks on villages, that those attacks have created fear among women and girls which has forced them to stay in or to return to their villages of origin, and that this can be taken as one of the factors that led to their displacement. Particularly outrageous cases of abduction, confinement and multiple rape over protracted periods of time have further contributed to spreading fear. Similarly, the Commission found sufficient evidence that rape and sexual violence continued to be systematically perpetrated against women during their displacement, so as to perpetuate the feeling of insecurity among them and fear of leaving the sites for displaced persons.

353. The above patterns appear to indicate that rape and sexual violence have been used by the Janjaweed and Government soldiers (or at least with their complicity) as a deliberate strategy with a view to achieving certain objectives, including terrorizing the population, ensuring control over the movement of the internally

displaced population and perpetuating its displacement. Cases like Kailek demonstrate that rape was used as a means to demoralize and humiliate the population.

(ii) Rape and other forms of sexual violence committed by rebels

354. Fewer cases of rape and sexual violence were reportedly committed by the rebels. In November 2004, SLA allegedly hijacked and for three days held five girls from the Gimir tribe near Kulbus, Western Darfur. During those three days, four of the girls were allegedly raped and one was sexually abused. Furthermore, there have been allegations that around 60 women and girls from the Beni Mansour tribe were raped or assaulted by rebels in the Malam area between February and July 2004.

355. The Commission was unable to investigate those reports. However, during its own investigations of incidents involving rebels, the Commission did not find any cases of rape committed by the rebels.

(b) Legal appraisal

356. Cruel, inhuman or degrading treatment or punishment (as well as torture) are prohibited by several international human rights instruments to which the Sudan is a party, including the International Covenant on Civil and Political Rights,[137] the Convention on the Rights of the Child,[138] and the African Charter on Human and Peoples' Rights.[139] The Convention on the Rights of the Child further requires States parties to undertake to protect the child from all forms of sexual exploitation and sexual abuse.[140] Furthermore, the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including sexual and reproductive health, is guaranteed by the International Covenant on Economic, Social and Cultural Rights.[141]

357. Common article 3 to the Geneva Conventions binds all parties to the conflict and, inter alia, prohibits violence to life and person, in particular cruel treatment and torture[142] and outrages upon personal dignity, in particular, humiliating and degrading treatment.[143] While the Sudan is not a party to Additional Protocol II to the Geneva Conventions, some of its provisions constitute customary international law binding on all parties to the conflict. This includes prohibition of rape, enforced prostitution and any form of indecent assault,[144] and slavery.[145]

358. Rape may be either a war crime, when committed in time of international or internal armed conflict, or a crime against humanity (whether perpetrated in time of war or peace), if it is part of a widespread or systematic attack on civilians; it may also constitute genocide. Rape has been defined in international case law (*Akayesu*, at paras. 597-598; *Delalić and others*, at para. 479; *Furundžija* at para. 185; and *Kunarac and others*, at paras. 438-60); in the judgement of the European Court of

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[137] Article 7.

[138] Article 37.

[139] Article 5.

[140] Article 34.

[141] Article 12.

[142] Article 3(1)(a).

[143] Article 3(1)(c).

[144] Article 4(2)(e).

[145] Article 4(2)(f).

Human Rights in *M.C. v. Bulgaria* (judgement of 4 December 2003, at paras. 88-108 and 148-187); and in the "elements of crimes" adopted by the International Criminal Court. In short, rape is any physical invasion of a sexual nature perpetrated without the consent of the victim, that is by force or coercion, such as that caused by fear of violence, duress, detention or by taking advantage of a coercive environment.[146]

359. In addition to rape, international law also prohibits and criminalizes, as either a war crime or a crime against humanity, any serious act of gender violence causing the victim to engage in an act of sexual nature by force, or by threat of force or coercion against the victim or another person, or by taking advantage of a coercive environment. The rationale for the criminalization of gender violence even when it does not take the form of coercive penetration of the human body is that such acts constitute an extreme form of humiliation and debasement of the victim, contrary to the most elementary principles of respect for human dignity.

360. It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the Janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a crime against humanity. The awareness of the perpetrators that their violent acts were part of a systematic attack on civilians may well be inferred from, among other things, the fact that they were cognizant that they would in fact enjoy impunity. The Commission finds that the crimes of sexual violence committed in Darfur may amount to the crime of rape as a crime against humanity, and it further finds that in some instances the crimes committed in Darfur may amount to the crime of sexual slavery as a crime against humanity. Furthermore, the Commission finds that the fact that rape and other forms of sexual violence were conducted mainly against three "African" tribes is indicative of the discriminatory intent of the perpetrators. The Commission therefore finds that the elements of persecution as a crime against humanity may also be present.

361. The Commission, as noted, did not find any case of rape committed by the rebels. However, if acts of rape were in fact committed by rebel actors, they would constitute war crimes.

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[146] See *Akayesu*, at paras. 597-598, 686-688: "[R]ape is a form of aggression and ... the central elements of the crime of rape cannot be captured in a mechanical description of object and body parts ... Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity ..." "The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive." "Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."

8. Torture, outrages upon personal dignity and cruel, inhuman or degrading treatment

(a) Factual findings

362. Incidence of torture and inhuman and degrading treatment of civilians in Darfur has been reported by several organizations. Rape, burning and beating, stripping women of their clothes, verbal abuse and humiliation of civilians were reported to have occurred frequently during attacks by the Janjaweed and the Government forces. Cruel and inhuman methods of killing, such as two cases of killing by crucifixion, were reported by one organization. Acts of torture and cruel, inhuman and degrading treatment of civilians placed under forced confinement by Janjaweed and Government forces following attacks on villages were also reported. Some sources have reported torture of captured enemy combatants by both the Government and the rebels.

363. Some organizations have also reported cases of torture of individuals, arrested in connection with the conflict in Darfur, during their detention by officials of the National Intelligence and Security Service. It was reported that physical and mental suffering was systematically inflicted on the detainees as punishment for their suspected affiliation with or support of rebels, and with the purpose of obtaining information or confessions.

(i) Torture and other cruel, inhuman or degrading treatment committed by the Government of the Sudan and/or the Janjaweed

a. Torture and other cruel, inhuman or degrading treatment during attacks

364. The Commission has established facts through its own investigations that confirm torture, cruel and degrading treatment, and inhumane acts committed as a part of the systematic and widespread attacks directed at the civilian population conducted by the Janjaweed and Government forces. Although Government forces did not generally participate directly in the commission of such acts, the Janjaweed committed the acts mostly in their presence, under their protection and with their acquiescence.

365. Inhumane acts such as throwing people, including children, into fire were committed by the Janjaweed during several attacks. Five such incidents were reported from Urbatete, Tarabeba, Tanako, Mangarsa and Kanjew villages in Western Darfur. In most of the incidents victims were burned to death. Extreme mental torture was inflicted on many mothers who saw their children burn alive after they were snatched from their arms by the Janjaweed and thrown into the fire. Houses were set on fire with the inhabitants still inside. Most of the victims in such incidents were children. Inhumane forms of killing used by the Janjaweed include crucifixion of victims during the attack on the village of Hashab in Northern Darfur in January 2004. In one case reported from Deleba in Western Darfur, the victim was beaten to death.

366. The persons under attack, predominantly from African tribes, were commonly subjected to beatings and whipping by the Janjaweed. These included women and young girls. In many incidents victims were subjected to severe beatings as a form of torture. The Commission has seen several victims who still bear the scars of the beatings, and some who suffered permanent physical damage as a result. Stripping

women of their clothes and the use of derogatory language as a means of humiliation and mental torture were also common to many incidents.

367. Particularly shocking were the acts of torture and cruel and degrading treatment that accompanied other serious crimes committed by Government forces and the Janjaweed against the civilian population during the Kailek incident in Southern Darfur. During the attack as well as the subsequent forced confinement of the population, several persons were subjected to severe torture in order to extract information about rebels, as punishment or to terrorize the people. The Commission has heard credible accounts that those captured by the assailants were dragged along the ground by horses and camels from a noose placed around their necks. Witnesses described how a young man's eyes were gouged out. Once blinded, he was forced to run and then shot dead. The victim population was watched over by guards who used the whips they carried to control and humiliate them. Several witnesses have testified that abusive and insulting terms were used against the detainees, who were often called "slaves". Their suffering was compounded by the scarcity of food and water, and the unhygienic conditions in which they were confined in the small, controlled spaces, within which they were forced to relieve themselves, because of restrictions on their movements. Several hundred children are reported to have died during the internment from an outbreak of disease.

b. Torture and other cruel, inhuman or degrading treatment of detainees by the National Security and Intelligence Service and by the Military Intelligence

368. The Commission gathered substantial evidence of the systematic use of torture by both the National Security and Intelligence Service and the Military Intelligence against detainees in their custody. In addition to other reliable information, the Commission has recorded testimony of those arrested in relation to the conflict in Darfur and currently under detention in Khartoum regarding torture and inhuman and degrading treatment to which they have been subjected. These include detainees kept by the National Security and Intelligence Service in a secret place of detention in Khartoum which the Commission discovered and inspected.

369. The Commission heard shocking accounts of physical and mental torture and cruel and degrading treatment to which these detainees had been subjected, and the inhuman conditions of detention in which they were kept. Most of them were repeatedly beaten, whipped, slapped and, in one case, kept under the scorching sun for four days. Three of the persons were suspended from the ceiling and beaten, one of them continuously for 10 days. The Commission also met with another individual who had been tortured by the National Security and Intelligence Service for three days after his arrest from an internally displaced persons' camp in Western Darfur. He stated that he had been suspended from the ceiling and beaten repeatedly. The Commission saw the scars left on the bodies of those detainees and prisoners as signs of the torture inflicted on them. In most of the cases torture, including threats to life and physical integrity, was used to coerce information or extract confessions. They were blindfolded with their hands tied whenever they were transported from one place of detention to another, and sometimes food was denied to them for long periods of time.

370. The detainees kept in the secret place of detention, mentioned above, had been confined in cells with barred windows 24 hours a day, without any outdoor exercise (the cells were occupied by a varying number of detainees, ranging from 1 to 11).

The detainees were not allowed regularly to use an outside toilet, situated on the same floor, and were thus, among other things, forced to use bottles to urinate inside their cells. Proper medical treatment or diet had not been made available to some of those who were suffering from serious health problems.

371. The Commission was also able to visit a Military Intelligence detention unit situated within the Army Headquarters in Khartoum. The Commission had been granted access to visit some military officers held in a section of the detention centre, but it soon discovered the existence of another section in the same detention centre, where no less than 40 detainees were held, most of them soldiers and non-commissioned officers (corporal, sergeant, etc.). All were held in custody in connection with the conflict in Darfur (some were from Darfur, others had allegedly been arrested because they had talked critically of the Government's policy in Darfur). The detainees were held in 20 cells (a twenty-first cell was empty) facing a corridor in a closed area. The cells are very cramped (their size being about 1 m by 2 m, or 1 m by 2.5-3 m), with very high ceilings and some narrow openings at the top. Thirteen cells contained two detainees each, while seven cells had only one detainee each. Most detainees were soldiers but a few cells contained soldiers and civilians. The cells have no lights, and the metal "window" of the door is kept shut for most of the day, only to be opened for 10 to 15 minutes during prayer time (five times a day). The detainees therefore live in almost complete darkness for most of the day and night, and for periods reaching months. The cells, with concrete walls and floor, often contain no mattress or blanket, but only a mat. No exercise in the open air is allowed to the detainees. They hardly ever go out of their cell except to relieve themselves in four latrines at the end of the corridor. A urine bottle is hung on the door knob. The detainees had been given soap and/or toothpaste the day of the visit of the Commission, for the first time in months.[147]

372. One detainee showed some scars on his back and arm, the result of beatings. Other witnesses mentioned that they often heard screams coming from that other, secret, section of the centre.

373. Other detainees, mainly officers, were held in larger cells, and seemed to have access to a small prayer area. Similarly to what has been described above, none of the detainees met at the Military Intelligence detention centre had been provided with any required medical treatment. Their families do not know of their whereabouts.

(ii) Torture and other cruel, inhuman or degrading treatment committed by the rebels

374. As noted, some sources have reported torture of captured enemy combatants by the rebels. The Commission, however, obtained no information indicating that this had occurred.

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[147] At the end of the visit of this area of the detention centre, an officer, who accompanied the Commission when it did not interview inmates in private, insisted that Commissioners should visit a new set of rooms ready to be used with a view to replacing in part the sets of tiny cells. The Commission visited this new area, consisting of relatively spacious rooms where up to 19 detainees could be held, and expressed the hope that the transfer should occur as soon as possible, so that at least 19 detainees of the 31 currently held in the tiny cells could be accommodated there.

(b) Legal appraisal

375. A number of international human rights instruments prohibit the use of torture. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights contain provisions prohibiting torture. The Sudan is party to the last three instruments, and as such is legally bound by them. The prohibition contained in the above-mentioned international instruments is absolute and non-derogable in any circumstances. Furthermore, under the International Covenant on Civil and Political Rights, even in a situation of public emergency no derogation from the prohibition of the use of torture can be made.

376. In addition, the prohibition on torture is also considered a peremptory norm of international law, or in other words a norm of *jus cogens*. As such it cannot be derogated from by contrary international agreement and *a fortiori* by a national law. That the prohibition of torture in customary international law has such a legal nature was held by the International Tribunal for the Former Yugoslavia in *Furundžija* (at para. 144, and paras. 153-157), by the House of Lords in *Pinochet*,[148] and also affirmed by the United Nations Special Rapporteur on Torture.[149]

377. Torture and cruel treatment are prohibited under common article 3 of the Geneva Conventions. Torture is absolutely prohibited by the Geneva Conventions, both in internal and international armed conflicts.

378. In addition to torture practised in the form of beating and severely and inhumanely ill-treating detainees, mentioned above, the Commission considers that the conditions in the Military Intelligence detention centre witnessed in Khartoum and described above amount to torture. To compel persons in military custody to live 24 hours a day in extremely small cells similar to cages, in pitch dark, with no outdoor exercise at all, in itself amounts to torture and thus constitutes a serious violation of international human rights and humanitarian law.

379. In connection with the conflict in Darfur, torture has been carried out on a large scale and in a widespread and systematic manner, not only during attacks on the civilian population, where it was inextricably linked with those attacks, but also in detention centres under the authority of the National Security and Intelligence Service and the Military Intelligence. The Commission finds that the occurrences of torture may therefore amount to a crime against humanity and, given the discriminatory nature of the attacks, may also involve the crime of persecution as a crime against humanity.

9. Plunder

(a) Factual findings

380. The Commission has noted that the majority of the reports it has examined provide very similar accounts of systematic and widespread looting and plunder of the property of civilians by Janjaweed, in particular in the context of attacks, as described above. These reports refer to witness accounts about Arabs or Janjaweed who attack, often with the support of Government troops. Looting itself is generally

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[148] *Pinochet* (third), speeches by Lord Browne Wilkinson (in 38 *International Legal Materials*, 199, at p. 589), Lord Hope of Craighead (ibid., p. 626), and Lord Millet (ibid., pp. 649-50).

[149] E/CN.4/1986/15, para. 3.

ascribed only to the Janjaweed, Arab or unspecified "men in uniform", while there are no incidents of looting clearly reported to have been committed by Government forces alone. The majority of the reported incidents involve the looting of cattle, food and other private property and occur during attacks on villages which often involve the killing of civilians and the destruction of the villages themselves. The looting of the property of internally displaced persons in places to which they have been displaced has also been recorded, involving the looting of plastic sheeting, food and other household items by Janjaweed.

381. In addition, a few incidents of looting have been reported by other sources where victims have identified the perpetrators as SLM/A, JEM or simply as rebels. Those incidents have been directed mainly against vehicles, either individual vehicles or vehicles in a convoy, and have mostly involved the looting of food and supplies. In a very few cases it was also reported that the rebels committed acts of looting during an attack on a village, in particular in Western Darfur. There were a number of looting incidents of humanitarian vehicles and other types of banditry where the perpetrators were not identified by witnesses.

382. In the incidents reported, there seems to be no specific geographic or temporal pattern connected to the looting of property other than the patterns identified under the sections dealing with the crimes of destruction of villages and attacks, namely that the victims predominantly belong to the Fur, Masalit, Zaghawa and other African tribes.

383. During its missions to the Sudan and Darfur, the Commission's findings were very much in conformity with the reports examined by the Commission. Practically all of the incidents investigated by the Commission involved the looting of private property of civilians by Janjaweed in the context of combined Janjaweed and Government attacks against villages.

384. Cases of armed banditry were also reported, involving the robbing of civilians in vehicles and other civilian targets. Most often, the perpetrators were unidentified.

385. A particular pattern recorded by the Commission was the fact that the internally displaced persons and refugees interviewed would place great emphasis on the crime of looting, and explain that the Janjaweed had taken everything those persons had owned, involving all goods necessary to sustain life in the difficult conditions in Darfur, including pans, cups and clothes, as well as livestock, representing the key source of income of the affected people. Often, the internally displaced persons and refugees had compiled detailed lists of the items looted which were presented to the Commission.

386. As examples of the witness testimonies collected by the Commission, the following two incidents are typical:

> On Saturday 27 December 2003, in the village of Domai Tamait in Southern Darfur: "We were attacked in the early morning around the time of morning prayer which is around 5.30 [witness shows bullet wound in leg]. The attackers were on horses and camels some with uniforms. They killed 17 people, including 2 women and 2 boys, and 18 persons were injured. They looted about 1,150 cattle and about 800 sheep and goats".
>
> In March 2004, in Dobo village in Northern Darfur: "They started burning everything and stealing our belongings. We were attacked the same day the

plane came, they bombed five cars and the Janjaweed looted the village. They took away our cattle and belongings".

387. The Commission also investigated looting in the context of attacks by Janjaweed during August and September 2003, in the Masteri locality (Western Darfur), where 47 villages had been attacked and Janjaweed had committed acts of looting. In one of the incidents, in Korcha — Turgu village, early in the morning, sometime in August 2003, hundreds of Janjaweed Arabs attacked the village. They were wearing green army uniforms and riding horses and camels. They surrounded the village and started shooting at men and boys. Six men were killed and buried in single graves. The day before the attack a helicopter and an Antonov were seen flying above the village. The attackers stole all livestock. The village was burned and people sought refuge in Masteri town.

388. The Commission also found cases of looting committed by the rebel movements. In particular during attacks against police stations and other Government installations, where rebels looted arms from the Government. Usually the attacks were specifically targeted at the Government installations to obtain weapons and ammunition, which the rebels needed in their fight. The rebels themselves confirmed this practice to the Commission. In addition, the Commission found a few cases of looting of private property committed by the rebels. For instance, in October and December 2003 JEM attacked Kulbus in Western Darfur as described above, where they looted shops in the market. A number of cases of looting of humanitarian convoys were also noted by the Commission, although it was not possible to confirm the identity of the perpetrators.

389. In conclusion, and in conformity with most of the incidents reported by other sources, the Commission found that the majority of cases involving looting were carried out by the Janjaweed and in a few cases by the Government forces. Looting was carried out mainly against African tribes and usually targeted property necessary for the survival and livelihood of those tribes. The rebel movements also engaged in acts of looting, mainly targeting police stations so as to obtain weapons; on a few occasions the rebels also targeted private property.

(b) Legal appraisal

390. As noted above under customary international law the crime of plunder or pillage is a war crime. It consists of depriving the owner, without his or her consent, of his or her property in the course of an internal or international armed conflict, and appropriating such goods or assets for private or personal use, with the criminal intent of depriving the owner of his or her property.

391. The pillage of villages and the appropriation of livestock, crops, household goods and other personal belongings of the inhabitants by the Government forces or the militias under their control no doubt amounts to a war crime.

392. On the basis of the information available to the Commission, it would appear that the looting carried out mainly by the Janjaweed in the context of attacks against villages has been conducted on a large scale and has been condoned by the Government of the Sudan through the propagation of a culture of impunity and the direct support of the Janjaweed.

393. In addition, as is the case with the destruction of villages, the Commission finds that pillaging, being conducted on a systematic and widespread basis, mainly

against African tribes, was discriminatory and calculated to bring about the destruction of livelihoods and the means of survival of the affected populations. Hence, it could very well constitute a form of persecution as a crime against humanity.

394. The Commission also finds it plausible that the rebel movements are responsible for the commission of the war crime of plunder, albeit on a limited scale.

10. Unlawful confinement, incommunicado detentions and enforced disappearances

(a) Factual findings

395. Reports from other sources reviewed by the Commission contained information on abductions, unlawful confinement and detention of civilians occurring during and after attacks by the Janjaweed or Government forces, as well as by the rebels. Many of the reports pertain to the abduction of women. While incidents were reported, very few of the accounts contained much detail.

396. However, through its own investigations the Commission was able to gather more substantial information on enforced disappearances. This information confirms the abduction and enforced disappearances conducted by Janjaweed following attacks on villages. In many of the cases women and men were abducted or disappeared, many without any trace. The Commission has also established that Government armed forces, the State security apparatus and military intelligence are responsible for unlawful confinement and detention of civilians. Furthermore, the Commission has received credible information which demonstrates a pattern of unlawful confinement of individuals within camps for displaced persons. Many displaced persons with whom the Commission met were unable to move even a few metres from their camp for fear of attacks, including rape and killing, by Janjaweed. The Commission heard credible testimonies from women who had been attacked, beaten and in some cases raped, while fetching firewood or water outside the camp. In some cases, displaced persons were prevented from accessing their cattle and crops nearby by the threat of attacks outside the camps by Janjaweed. This pattern is reflected in the following witness testimony from Fato Borno, Northern Darfur:

> The people from all surrounding villages of Fato Borno are now living in Fato Borno Displaced Persons' camp in very distressed condition. We want to go back to villages and live there. But the villages are not safe to live. The Janjaweed are still very active on the outskirts of our camp. The people living in our camp often face attack from Janjaweed when they go out of the camp. There is a Government police camp nearby our camp but the police have failed to protect our people from the Janjaweed attack. Two months ago, Janjaweed attacked my uncle and his sister when they went outside Fato Borno camp towards the village of Krene. Janjaweed killed my uncle's sister and shot my uncle in his right shoulder and right leg.

397. Abduction of women by Janjaweed was also found to be a part of some of the incidents of attacks investigated by the Commission, including in Tawila, Northern Darfur, and Mallaga, Mangarsa and Kanjew in Western Darfur. Those who escaped or were eventually released were able to relate the enforced confinement, sexual slavery, rape and torture that they had to suffer. As a general pattern, women were forcibly taken from their villages and kept at Janjaweed camps for a period of time,

some times as long as three months, before they were either released or managed to escape captivity.

398. In some incidents of attacks by Janjaweed, men and boys were abducted, and in many cases are still missing. The Commission received evidence that civilians had been abducted by leaders of the Janjaweed and detained in camps that the Commission has identified, where they were tortured and used for labour. During pre-arranged monitoring visits of independent observers, those civilians were taken out of the camp and hidden. The Commission has credible evidence that the military is in control of those camps and that army officers were aware of the illegal detention of civilians in the camps. In one case a civilian was seized by the Janjaweed after an attack on his village, was kept in captivity in a Janjaweed camp and later shifted to military camp in the area.

399. The most serious cases of enforced disappearance involved the disappearance of civilians by security and intelligence apparatus, both civil and military. The Commission received credible information that several individuals were taken away by military intelligence or security operators. While some of those individuals subsequently returned, many remain unaccounted for. Those who did return have given credible testimony of the presence of many of those missing in unofficial and secret places of detention maintained by the security apparatus in different locations in the Darfur region.

400. In one case, during a joint attack in March 2004 by the Janjaweed and Government armed forces on several villages around Deleig in the Wadi Saleh area of Western Darfur, 300 people were seized and taken away by the Government forces. Almost half of those persons are still missing and many are feared to have been killed.

401. Illegal arrest and detention of individuals appears to be common practice in operations by the State security apparatus relating to the conflict in Darfur. The Commission met with persons held in secret detention. The detainees included students, lawyers and traders. In many cases their families were unaware of their arrest or of their whereabouts. Among them was one 15-year-old boy who had been arrested in Nyala, Northern Darfur, in November 2004 when he was returning home from work. His family did not know of his arrest or of his whereabouts. He was epileptic, and had not received any medical help since his detention. All of the detainees were held incommunicado. Except for the case mentioned above, all had been detained for more than three months, and in one case for almost a year, without any charge. They had never been produced before a court, or allowed to see a lawyer.

402. The Commission has also received credible information on cases of abduction by the rebels. In one case of rebel attack on Kulbus, towards the end of 2003, 13 men were abducted and are still missing. In another attack on a village in Zalatia area in Western Darfur, three children were abducted by a rebel group. Those children are still missing. The Commission received further information on the abduction by rebels of individuals from Fata Borno, Magla and Kulkul. The rebels accused these persons of collaborating with Government and Arab tribes. The Commission received credible information that those persons were tortured and subjected to cruel, inhuman and degrading treatment. In other cases individuals were abducted after their vehicles were seized and taken by the rebel groups. Both SLA and JEM have been named as those responsible for the incidents.

(b) Legal appraisal

403. The right to liberty and security of person is protected by article 9 of the International Covenant on Civil and Political Rights. The provisions of the article are to be necessarily read in conjunction with the other rights recognized in the Covenant, particularly the prohibition of torture in article 7, and article 10, which enunciates the basic standard of humane treatment and respect for the dignity of all persons deprived of their liberty. Any deprivation of liberty must be done in conformity with the provisions of article 9: it must not be arbitrary; it must be based on grounds and procedures established by law; information on the reasons for detention must be given; and court control of the detention must be available, as well as compensation in the case of a breach. These provisions apply even when detention is used for reasons of public security.

404. An important guarantee laid down in paragraph 4 of article 9 is the right to control by a court of the legality of detention. In its General Comments the Human Rights Committee has stated that safeguards which may prevent violations of international law are provisions against incommunicado detention, granting detainees suitable access to persons such as doctors, lawyers and family members. In this regard the Committee has also stressed the importance of provisions requiring that detainees should be held in places that are publicly recognized and that there must be proper registration of the names of detainees and places of detention. It follows from the Comments of the Committee that for the safeguards to be effective, these records must be available to persons concerned, such as relatives, or independent monitors and observers.

405. Even in situations where a State has lawfully derogated from certain provisions of the Covenant, the prohibition against unacknowledged detention, taking of hostages or abductions is absolute. Together with the human right of all persons to be treated with humanity and with respect for the inherent dignity of the human person, these norms of international law are not subject to derogation.

406. The ultimate responsibility for complying with obligations under international law rests with the States. The duty of States extends to ensuring the protection of those rights even when they are violated or are threatened by persons without any official status or authority. States remain responsible for all violations of international human rights law that occur because of failure of the State to create conditions that prevent, or take measures to deter, as well as by any acts of commission including by encouraging, ordering, tolerating or perpetrating prohibited acts.

407. The importance of determining individual criminal responsibility for international crimes whether committed under the authority of the State or outside such authority stands in addition to State responsibility and is a critical aspect of the enforceability of rights and of protection against their violation. International human rights law and humanitarian law provide the necessary linkages for this process of determination.

408. With regard to international humanitarian law, article 3 common to the Geneva Conventions prohibits acts of violence to life and person, including cruel treatment and torture, taking of hostages and outrages upon personal dignity, in particular humiliating and degrading treatment.

409. According to the Statute of the International Criminal Court, enforced disappearance means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.[150] When committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, these acts may amount to a crime against humanity.[151]

410. The abduction of women by Janjaweed may amount to enforced disappearance as a crime against humanity. The incidents investigated establish that the abductions were systematic, were carried out with the acquiescence of the State, as the abductions followed combined attacks by Janjaweed and Government forces and took place in their presence and with their knowledge. The women were kept in captivity for a sufficiently long period of time, and their whereabouts were not known to their families throughout the period of their confinement. The Commission also finds that the restraints placed on the internally displaced population in camps, particularly women, by terrorizing them through acts of rape or killings or threats of violence to life or person by the Janjaweed, amount to severe deprivation of physical liberty in violation of rules of international law.

411. The Commission also finds that the arrest and detention of persons by the State security apparatus and the Military Intelligence, including during attacks and intelligence operations against villages, apart from constituting serious violations of international human rights law, may also amount to the crime of enforced disappearance as a crime against humanity. Those acts were both systematic and widespread.

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[150] Statute of the International Criminal Court, article 7(2)(i). Similarly, the Declaration on the Protection of All Persons from Enforced Disappearances defines an enforced disappearance as when "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups, or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law".

[151] The elements of the crime of enforced disappearance relevant to the Commission's findings are:

1. That the perpetrator:
    (a) Arrested, detained or abducted one or more persons; or
    (b) Refused to give information on the fate or whereabouts of such person or persons.
2. Such refusal was preceded or accompanied by the deprivation of freedom.
3. The perpetrator was aware that such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
5. The refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

412. Abduction of persons during attacks by the Janjaweed and their detention in camps operated by the Janjaweed, with the support and complicity of the Government armed forces, amount to gross violations of human rights, and to enforced disappearances. However, the Commission did not find any evidence that these were sufficiently widespread or systematic as to constitute a crime against humanity. Nevertheless, detainees were subjected to gross acts of violence to life and person. They were tortured or subjected to cruel and humiliating and degrading treatment. The acts were committed as a part of and were directly linked to the armed conflict. As serious violations of common article 3 of the Geneva Conventions, binding on the Sudan, the Commission finds that the acts constitute war crimes.

413. Abductions of persons by the rebels also constitute serious and gross violations of human rights, and amount to enforced disappearance, but the Commission did not find any evidence that they were either widespread or systematic enough to constitute a crime against humanity. The Commission, nevertheless, has sufficient information to establish that acts of violence to life and person of the detainees were committed in the incidents investigated by the Commission. Detainees were also subjected to torture and cruel, inhuman and degrading treatment. The acts were committed as a part of and directly linked to the armed conflict and, therefore, constitute war crimes as serious violations of common article 3 of the Geneva Conventions.

11. Recruitment and use of children under the age of 15 in armed hostilities

(a) Factual findings

414. There have been some reports by other sources of the use of child soldiers by the two rebel groups, JEM and SLA. Those reports, however, contained no details regarding, for instance, the manner of their recruitment or the area of their deployment. The Government of the Sudan also made this allegation against the rebels, but did not produce any concrete information or evidence that could assist the Commission in making a finding of fact on this issue.

415. Inquiries made by the Commission indicate that both JEM and SLA have recruited children as soldiers. There is, however, no indication that these are forced recruitments. The children have been seen in uniforms and carrying weapons in and around the rebel camps. Independent observers confirmed the presence of child soldiers in areas of conflict. While the Commission cannot rule out their participation in combat, it did not receive credible information on deployment of child soldiers in armed combat.

416. In its meetings with leaders of both rebel groups, the Commission did confront them with these allegations. Both groups deny the use of children in armed combat. The SLA leadership does not deny that children are living in some of their camps. However, they deny that these are child soldiers or take any part in armed hostilities. According to them, the children were orphaned as a result of the conflict and SLA takes care of them. The Commission does not find this explanation convincing. As stated above, different sources have confirmed that the children are in uniform and carry weapons. The Commission, therefore, cannot rule out their engagement in combat.

(b) Legal appraisal

417. As stated above, an international customary rule has evolved on this matter to the effect that it is prohibited to use children under 15 in armed hostilities. The Sudan has also ratified Convention 182 of the International Labour Organization concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits the forced or compulsory recruitment of children for use in armed conflict. The Convention defines children as all persons under the age of 18. Furthermore, the rebels, like the Government of the Sudan, are bound by article 8 of the Protocol on the Enhancement of the Security Situation in Darfur in Accordance with the N'Djamena Agreement, of 9 November 2004. Under this provision, the parties shall refrain from recruiting children as soldiers or combatants, consistent with the African Charter on the Rights and Welfare of Children, the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

418. It follows that if it is convincingly proved that the Government or the rebels have recruited and used children under 15 in active military hostilities, they may be held accountable for such a crime.

VII. Action of Sudanese bodies to stop and remedy violations

419. The Government of the Sudan was put on notice concerning the alleged serious crimes being committed in Darfur. It was requested not only by the international community but, more importantly, by its own people to put an end to the violations and to bring the perpetrators to justice. While several Government officials acknowledged that serious violations of human rights and humanitarian law occurred in Darfur, they maintained however that they had been acting responsibly and in good faith to stop the violence and address the crisis. Some argued that, while it was sometimes said that the Government was unable to deal with all the problems, nobody could claim that it was unwilling.

420. The section below assesses the effectiveness of the measures taken by the Government of the Sudan particularly to investigate the crimes and to bring their perpetrators to justice. It focuses on the role of law enforcement agencies, in particular the police, examines some aspects of the legal and judicial system, and assesses some extrajudicial mechanisms such as the National Commission of Inquiry and the Rape Commissions.

A. Action by the police

421. The role of the police in the current conflict is far from clear. The Government claims that the institution was weakened as a result of the conflict in Darfur. Attacks on police stations and garrisons and looting of weapons by the rebels have been an important feature of the insurgency. In fact, the Government claims that, from January 2003 to November 2004, 685 policemen were killed by rebels, 500 were injured, 62 were missing, and 1,247 weapons were looted from police stations.[152] It

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[152] Figures provided by a Ministry of the Interior Committee to the Commission on 19 November 2004.

states that this resulted in a breakdown of law and order and encouraged banditry and crime.

422. Normally, in an international armed conflict the civil police force does not formally take part in the hostilities and can, at least theoretically, be considered a non-combatant benefiting from the safeguards and protections against attack. However, in the particular case of the internal conflict in Darfur, the distinction between the police and the armed forces is often blurred. There are strong elements indicating occurrences of the police fighting alongside Government forces during attacks or abstaining from preventing or investigating attacks on the civilian population committed by the Janjaweed. There are also widespread and confirmed allegations that some members of the Janjaweed have been incorporated into the police. President Al-Bashir confirmed in an interview with international media that, in order to rein in the Janjaweed, they were incorporated in "other areas", such as the armed forces and the police.[153] Therefore, the Commission is of the opinion that the civilian status of the police in the context of the conflict in Darfur is questionable.[154]

423. Victims sometimes also attributed a positive role to the police, however. They told the Commission that the police were indeed targeted during the attacks on villages, but they mainly blamed the Janjaweed for these actions. Also, while victims often expressed lack of confidence in the ability and willingness of the Government to protect them, the police were often cited as an exception to this trend. The reason is perhaps that, apart from the leaders, most of the police in Darfur were Darfurians. Some witnesses informed the Commission that during attacks by the Janjaweed the police, often small in numbers, attempted to protect the villagers, but were often ill-equipped and heavily outnumbered. One example was an attack on Molli (Masalit tribe) by the Janjaweed on 23 April 2003 — a market day. Market stalls were totally destroyed and livestock looted. Police arrested seven Janjaweed, but they were released by a court order, ostensibly for lack of evidence.

424. That the Janjaweed overpower the police is a trend that started even before the current crisis and could be detected from information provided by the Government itself. For instance, the judgement in a case known as *Jagre al-Hadi al-Makbul and others* describes how a combination of the police and armed popular forces numbering 39 left the inhabitants of Thabit at the mercy of a large contingent of *fursan* attackers.[155] The case involves the two Arab tribes of Maalia and Rizeigat. The facts of the case are that a Rizeigat member of the national security was killed in a fight with two Maalia policemen. Forty days after the event, 700 to 800 *fursan* in uniform and equipped with weapons gathered to avenge his death. They attacked and killed 54, wounding another 24 and burning houses before retreating with looted cattle and household property. According to the judgement, the 39 members of the official forces, including police and the popular forces, requested their headquarters

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[153] See interview on CNN of 31 August 2004, transcript at http://edition.cnn.com/2004/WORLD/africa/08/31/amanpour.bashir/index.html; accessed on 2 January 2005.

[154] The situation is different for the few reported cases where the Janjaweed are alleged to have killed police officers. In those cases, no legal justification can be found in international humanitarian law. The Janjaweed engaging in the armed conflict are siding with the Government, and thus with the police.

[155] The case, which was decided by the Special Court of Nyala in Southern Darfur, describes events that took place on 18 May 2002 involving 96 defendants. The court sentenced 88 persons to death, one for 10 years, and ordered the confiscation of weapons and return of property.

to allow them to engage the attackers, but the headquarters refused because of the disparity in numbers. The official forces then withdrew.

425. In view of the escalation of the crisis and the ineffectiveness of the police to address the crisis, the people in Darfur appear to have no faith in this institution. A number of victims informed the Commission that they would not go to the police to submit complaints against actions by the official forces or the Janjaweed. They did not think that the police would pursue the complaint and they feared reprisals. In fact, when officials in the three States of Darfur were requested to submit information on the number of registered complaints, they mainly provided lists of complaints registered as a result of attacks by the rebels. As for attacks by Janjaweed, little information was provided. The most extensive list of complaints against the Janjaweed was provided by the Governor of Northern Darfur. It included 93 complaints registered from February 2003 to November 2004. The list was, however, silent on the measures taken by the police to pursue the complaints.

426. The Government claimed that there were between 9,000 and 12,000 policemen deployed in Darfur to protect the internally displaced persons. The impact of that presence was, however, not felt by the displaced persons, as the situation at the Fata Borno camp illustrates. The inhabitants there were confined in an area defined by a reddish rock and a riverbed (wadi). Any attempt by the displaced to venture beyond the confined area was met with shots from the Janjaweed in their nearby mountainous hideout. The police, located at the edge of the camp, showed no interest in confronting the Janjaweed. It is reasonable to assume that the police presence is more for political reasons than any form of protection. Also, from 27 September 2003 to May 2004, seven villages[156] near Nyala were persistently attacked by the Janjaweed. That resulted in the displacement of more than 1,000 civilians. No action was taken by police against the Janjaweed.

427. Several procedural hurdles prevented the police from acting effectively. An example was the practice whereby victims of certain crimes in Darfur, such as rape, required what was termed "Form 8" from the police before they could receive medical examination and treatment. A directive entitled "The Minister of Justice Criminal decree 1/2004", effective from 21 August 2004, was adopted to dispense with that requirement. However, it was clear from interviews conducted by the Commission with rape victims, including in Zam Zam camp in Northern Darfur, that the police still applied the Form 8 rule. The prosecutor's office and the police were hesitant when asked about their knowledge of the decree and it was clear to the Commission that they were not aware of the existence of the decree. Similarly, judicial officials in Khartoum were unaware of both that decree and of a subsequent decree on the same subject, which was effective from 11 December 2004.

B. Action by the Judiciary

428. The Commission repeatedly requested the Government to provide information on judicial action taken to bring to justice the perpetrators of the alleged crimes committed in Darfur. Despite repeated requests from the Commission, the Government continued to cite just one case relevant to the Commission's mandate and on which the judicial system had taken action in 2003. This was the case of

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[156] Umalhairan, Rahad Alnabag, Faraleh Oldalyba, Draib Alreeh, Umbaouda, Baba, Kashlango

Jamal Suliman Mohamad Shayeb in the village of Halouf regarding the killing of 24 individuals, some of them women and children, looting of property, and the burning of the village. Two other cases referred to the Commission as evidence of action by the judiciary were, first, the case of *Jagre al-Hadi al-Makbul and others* before the Special Court of Nyala mentioned above, and secondly the case of *Hafedh Mohammed Dahab and others* regarding the attacks on the villages of Jugma and Jabra which resulted in the killing of four people, including the burning of one individual, injuring of others, and the looting and burning of houses. However, both of those cases concerned events that occurred in 2002. The Commission thus considers that the Government failed to demonstrate that it had taken measures to prosecute those involved in the attacks carried out since February 2003.

429. The Government also cited its acknowledgement of three cases of mistaken bombings. It stated that it compensated the victims of Habila, Umm Gozin, and Tulo. The head of the military committee that was established to compensate the victims in Habila briefed the Commission. He claimed that the victims were reluctant to receive compensation. The Commission learned from other sources, however, that the real reason was that the victims were insisting that a comprehensive investigation into the alleged mistake be conducted.

430. The Government charged that the rebels attacked court buildings and personnel, implying that this had weakened their effectiveness. Citing an example, the Commission was informed that, during an attack on Kutum in Northern Darfur on 1 August 2003, the rebels attacked the criminal court and the houses of the judges, looting their contents. Documents, evidentiary material and files were also burned. During an attack on 10 July 2004 on the village of Alliet, which has been the subject of frequent attacks by SLM/A and JEM, as well as Government forces, a judge was abducted by the rebels. He was released on 13 August. In another attack on the same village on 20 September 2004, the Government claimed that rebels attacked the court and destroyed furniture and documents. The house of the judge was apparently also looted.

431. According to the Commission's findings, it is unlikely that the legal and judicial systems in the Sudan in their present form are capable of addressing the serious challenges resulting from the crisis in Darfur. Victims often expressed lack of confidence in the ability of the judiciary to act independently and in an impartial manner. Having some senior judges in Darfur involved in the design and implementation of controversial policies such as the return of internally displaced persons weakened the credibility of the judiciary in the public eye. A brief description of the judicial system and an assessment of its ability to do justice in accordance with international human rights standards are provided below.

1. An overview of the Sudanese judicial system

432. The 1998 Constitution asserts the independence of the judiciary. However, the judiciary appears to have been manipulated and politicized during the last decade. Judges disagreeing with the Government often suffered harassment, including dismissal.

433. Article 103 of the Constitution spells out the structure of the country's judicial system, which includes the Supreme Court, courts of appeal and courts of first instance. In a hierarchical fashion, the Supreme Court, a three-member bench and the highest and final judicial authority, is positioned at the apex. Its decisions on

appeals from the Court of Appeal on criminal, civil, personal and administrative matters are final and may be altered only by the Chief Justice, if in his view a particular Shariah law has been infringed.

434. Each of the State capitals has a Court of Appeal presided over by three judges. Appeals on criminal, civil and personal matters from the public courts lie to the Court of Appeal. The court can review its own decisions and has a single-judge-first-instance jurisdiction to review matters of administrative authority.

435. The public courts are set up under the 1991 Code of Criminal Procedure, which allows the Chief Justice to constitute them but also to determine their jurisdiction. The courts' jurisdiction is partly appellate and partly courts of first instance. Appeals from the District Courts lie to the public courts. The original jurisdiction of the courts lies in the adjudication of cases with commercial bias, as well as cases involving the personal status of non-Muslims.

436. District courts have original and appellate jurisdictions to hear appeals on civil (Civil Procedure Act 1983) and criminal matters (Criminal Act 1991) from the town courts. The pecuniary powers of the courts in civil cases as well as their penal powers as regards the imposition of fines in criminal matters are defined by the Chief Justice.

437. The town courts are the lowest courts in the Sudan. Decisions rendered by the town courts may be appealed to the district courts. They are popular courts whose members are chosen from among citizens of good conduct. A distinctive feature of these courts is their application of customs not inconsistent with general law or with public policy. In most cases they resort to conciliation and accord in solving disputes over areas of pasture, water and cultivation. They are established under a warrant issued by the Chief Justice.

438. In addition, a Constitutional Court established by Article 105 of the Constitution basically considers and adjudicates on matters relating to the interpretation of articles of the Constitution and, among others, claims by the aggrieved for protection of freedoms, sanctities or rights guaranteed by the Constitution. As the President suspended significant provisions in the Constitution in 1999 and granted wide powers to the security apparatus, there is little proof that this court is effective.

439. Despite the structure described above, a system of special and specialized courts has been established, particularly in Darfur. Cases of interest to the Government appear to be referred to these courts. In addition to the courts described below, the President has established some extraordinary courts to try specific cases. For instance, a case involving 72 army officers, mostly from Darfur, was referred to such an extraordinary court in Khartoum. A judge was brought from Kordofan especially to try the case.

440. On 12 January 2005, the Commission observed one session in a trial of a group of 28 individuals from Darfur. They included a number of air force pilots who had refused to participate in bombing areas in Darfur. Although the session was tense, the Commission was told that it was the first time that the trial had been conducted in accordance with the regular proceedings. In previous sessions, even questions on legal issues by the defence were refused. The defence team was dismissed by the court at one stage. During that period, witnesses were examined and confessions against the defendants were obtained. When a witness changed his

statement during the trial session following the intervention of defence lawyers, the court started perjury proceedings against him. He collapsed in the court.

2. The specialized courts

441. The courts initially established as special courts by decrees under the state of emergency in Darfur in 2001 were in 2003 transformed into specialized courts. A decree issued by the Chief Justice on 28 March 2003 first established the Specialized Court in Western Darfur, and later did the same in Northern and Southern Darfur. They failed, however, to remedy certain flaws in the special courts, which were passed down to the specialized courts.

442. The specialized courts inherited the functions and jurisdiction of the special courts. Like their predecessors, the new courts try charges of armed robbery, banditry, offences against the State, possession of unlicensed firearms, attacks against the State, disturbing public order, and any other crimes that the Chief Justice or the head of the judiciary may include in the courts' jurisdiction. The majority of those tried under these courts for possession of arms are said to be from farming communities and practically never from nomadic tribes.

443. Special courts were headed by a judge sitting with a member of the police and a member of the army. However, since a single judge sitting alone now heads a specialized court, the Sudanese authorities argue that these courts are an improvement compared to the previous courts. A further argument is that they have been established for reasons of expediency.

444. The specialized criminal courts were created in particular for Darfur and Kordofan, apparently to help expedite the hearing of certain cases. However, the reason for their establishment may be described as "fast tracking" rather than expediency, particularly in the light of the fact that, according to reports, the hearing of a charge punishable by death may take no more than one hour.

445. One flaw inherent in the 2003 decree which established the courts is the failure to ensure that confessions extracted under torture or other forms of duress are excluded from the evidence. It is fundamental to the principles of due process that an accused must not be compelled to testify against himself or herself or to confess to guilt (International Covenant on Civil and Political Rights, article 14,3(g)). Therefore, when an accused challenges in court his alleged confession as having been extracted under torture, the court is put on notice to investigate the challenge and to rule, giving reasons, for the admissibility or otherwise of the alleged confession before continuing. There are several examples however to demonstrate that the specialized courts do not proceed in this manner. It has been reported that an individual was arrested in January 2004 on charges relating to banditry. He was said to have been tortured by security forces, as a result of which he confessed to the charge. At his appearance in court in June 2004, he told the judge he had confessed under torture and sought to withdraw the confession. The judge summarily declined the withdrawal and the case proceeded against the accused. Any law which ignores the procedure of investigating a challenged confession and so allows a judge to summarily refuse the withdrawal of the confession is contrary to the rights of the accused.

446. The decree on the special courts allowed the accused to be represented by "friends" only. In other words the accused could not exercise the right to be

represented by a counsel of choice. Although the 2003 decree allows for legal representation, it lacks fullness. Counsel has limited time to cross-examine prosecution witnesses and to examine defence witnesses and there are restrictions for visiting the accused in detention to facilitate the preparation of his defence.

447. The trials are still conducted summarily, as was done by the special courts, and the death penalty may be pronounced by the court for a wide range of offences. According to the decree, an appeal must be filed within seven days to the head of the judiciary, who delegates the case to members of the Court of Appeal. This is a rather short period, considering that court records and grounds for appeal need to be prepared before completing filing. Also interlocutory decisions are not subject to any appeal. One cannot but believe that there is an element here intended to discourage convicted persons from appealing against their convictions. Save for sentences of death, amputations, or life imprisonment, which are heard by a panel of judges, the appeals are heard by one judge. There is no possibility of further judicial review. In a situation where the right of appeal is limited, the likelihood that innocent persons may be put to death is increased.

448. The court does not appear to draw a distinction between adult and minor offenders. Minors are therefore at risk of receiving the death sentence, in particular when they are charged and stand trial together with adults. On a reliable account a trial of seven persons arrested at the Kalma camp included two persons under the age of 18. All seven denied the charge and have alleged police brutality. At the Nyala Specialized Court, where they were standing trial for murder, they faced the death penalty if convicted.

449. The fact that the specialized courts apply principally to the Darfur States and Kordofan, rather than to the whole of the Sudan, calls into question the credibility and reliability of these courts. The purpose of the courts is too glaring to miss. The Government would do a great service to its judicial system if it took steps to repeal the decree that established the courts. The Commission recommends that the Government ensure the closure of the courts.

C. Sudanese laws relevant to the present inquiry

450. A number of serious flaws prevent the justice system in the Sudan from acting swiftly and appropriately to address abuses. Much could be said about the compatibility of Sudanese laws with international standards. A state of emergency was declared in the Sudan in 1999 and has been consistently renewed since then. Important constitutional guarantees are suspended. In effect, the Sudan is still mainly ruled by decrees. An example is the Specialized Court decree. Judicial officials tried to explain away the passing of decrees as an interim measure taken when Parliament is in recess, which Parliament may retain or repeal when it reconvenes. Asked what would be the fate of a suspect convicted under the decree before a parliamentary action to repeal the law, one response was, "it's not reversible". The other was that the conviction may be quashed on appeal. One cannot but view the continued parallel use of decrees and laws as tending to make the parliamentary process a charade.

451. Furthermore, the Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity. The 1991 Criminal Procedure Code moreover contains provisions that prevent the effective prosecution of such acts. The law

provides wide powers to the executive and grants immunity from prosecution to many State agents. To illustrate some of these problems, the provisions of the National Security Forces Act of 1999 are presented below.

452. By section 31 of the National Security Act, under an order issued by the Director-General a security agent can carry out an arrest, a search, or detain and investigate an individual. He has three days within which to furnish the detainee with reasons for his arrest and detention. The period may be extended for three months by the Director-General and may, with the approval of the Attorney-General, be renewed for a further three months. If it is deemed necessary, the Director-General may request the national Security Council to renew the detention for a further three months. A detainee may appeal this decision before a judge. There are no guarantees, however, for immediate access to counsel. The prescribed period of detention under section 31 is frequently ignored. The Commission met numerous detainees in security detention centres who were detained for longer periods without access to a lawyer or an appearance in court.

453. Section 9 of the Act gives certain powers to a member of the organ designated by the Director-General to execute particular functions. It empowers seizure of property of detainees "in accordance with law". A right under section 32(2) allows the detainee to communicate with his family "where the same does not prejudice the progress of the interrogation, inquiry and investigation of the case". These qualifying phrases negate clarity and only succeed in bringing vagueness and inferiority into the law. Even if members of the detainee's family are aware of the right to communicate or where the family may apply for permission to make contact with their relatives, it is doubtful that they will have the courage to brave the aura of fear that surrounds the security apparatus. Investigations conducted by the Commission disclose that more often than not the permission, when sought by the courageous few, is not granted. In the result the detainee becomes an incommunicado detainee, his detention sometimes exceeding a 12-month period, without charges, with no access to counsel, no appearance in court and not permitted visitors. At Kobar prison in Khartoum the Commission interviewed a number of such detainees. Others have been detained at a north Khartoum prison since January 2004 in similar circumstances. A gross violation of the rights of the detainees and a contravention of article 14.3(c) of the International Covenant on Civil and Political Rights. In addition, the national security apparatus violates section 31 of its own law which indicates that, after the prescribed period of detention, that is to say a maximum of nine months, the detainee must be tried or released.

454. Section 33 gives wide immunities to members of the National Security and Intelligence Service and their collaborators. None of them shall be compelled to give information about the organization's activities which they have come by in the course of their duty. Except with the approval of the Director-General, no civil or criminal action shall lie against either of them for any acts they may have committed in connection with their work, which approval the Director-General will grant only if the action is unrelated to their duties. Their right to institute action for compensation against the State is however preserved. Where the Director-General agrees that an action may proceed against a member of the force and his collaborators, and the action is based on acts done in the course of official work, be it during or after termination of employment, the trial will be held in an ordinary court but will be heard in secret. Again, this is contrary to article 14(1) of the International Covenant on Civil and Political Rights which sets down "public

hearing" as a basic standard for a fair trial. When confronted with trials "in secret", the Director-General of the National Security and Intelligence Service, Sallah Abdallah, also known as Sallah Gosh, described the English translation as inaccurate. Since then the Commission has had the Arabic text translated, and it is clear that the trial in secret is part of the law. The clear inference from section 33 is that a member of the security services may, under the umbrella of the law, torture a suspect, even to death, if his acts are done in the course of duty. The Commission strongly recommends the abolition of this law.

455. On the basis of the above, the Commission considers that, in view of the impunity which reigns in Darfur today, the judicial system has demonstrated that it lacks adequate structures, authority, credibility and willingness to effectively prosecute and punish the perpetrators of the alleged crimes that continue to be committed in Darfur.

D. Action by other bodies

1. The Sudanese Commission of Inquiry

456. The President set up a National Commission of Inquiry on 8 May 2004. This 10-member body was mandated to collect information on alleged violations of human rights by armed groups in the Darfur States, inquire into allegations against armed groups in the area and the possible resulting damage to lives and property and to determine the causes of the violations when established. The Commission was provided a copy of the final report of the National Commission on 16 January 2005.

457. The final report indicates the National Commission's method of work. It met 65 times, listened to 228 witnesses, and visited the three States of Darfur several times. It visited 30 incident locations and met with the local authorities, particularly the armed forces. It requested documents from various governmental bodies and reviewed the reports of the organizations that visited the Sudan, including the United Nations, the African Union and the Organization of the Islamic Conference, as well various human rights groups, particularly Amnesty International and Human Rights Watch, as well as reports by some Governments, particularly those of the United States and the European Union countries. In other words, the National Commission was fully aware of the serious allegations of the crimes committed in Darfur.

458. The report starts with providing an overview of Darfur. It devotes a major part to the crime of genocide. It discusses five crimes: bombing civilians in the context of the Geneva Conventions; killings; extrajudicial killings; rape as a crime against humanity; and forcible transfer and ethnic cleansing.

459. Below is an unofficial translation of the main findings of the National Commission, as they appear in its executive summary:

> Serious violations of human rights were committed in the three Darfur States. All parties to the conflict were involved, in varying degrees, in these violations which led to much human suffering that obliged the people of Darfur to migrate to State capitals and to take refuge in Chad.
>
> What happened in Darfur, despite its gravity, does not constitute the crime of genocide because of the unavailability of the genocide determination

conditions. The National Commission had no proof that any of the protected ethnic, religious, racial or national groups was subjected, in bad faith, to bodily or mental harm or to living conditions targeted at its total or partial extermination. The Darfur incidents are not similar to what happened in Rwanda, Bosnia or Cambodia. In those precedents, the State concerned pursued a host of policies leading to the extermination of a protected group.

The National Commission had proof that the Darfur incidents were caused by the factors mentioned in the report and the explained circumstances. It also had proof that describing the incidents as genocide was based on exaggerated unascertained figures relating to the numbers of persons killed.

The National Commission had proof that the armed forces bombarded certain areas in which some opposition members sought shelter. As a result of that bombardment, some civilians were killed. The armed forces investigated the incident and indemnified those who sustained damage or loss in the areas of Habila, Umm Kazween and Tolo. The Wad Hagam incident is still being investigated.

The National Commission had proof that the armed opposition groups committed similar acts killing unarmed citizens as well as wounded military personnel in Buram hospital and burning some of them alive.

The National Commission also had proof that many of the killing incidents were committed by various tribes against each other in the context of the conflict going on in certain areas such as Sania Deleiba, Shattaya etc.

The killing of citizens in all the aforementioned cases constitutes a violation of common article 3 of the 1949 Geneva Conventions ...

The killing incidents committed by all the armed conflict parties, which, under their various circumstances, may amount to a violation of common article 3 of the 1949 Geneva Conventions, do not, in the opinion of the National Commission, constitute a genocide crime because of the unavailability of the elements of this crime, particularly the absence of any proof that any protected group was targeted and the absence of a criminal intent.

Allegations of summary executions were received from all parties. However, some of these allegations were not proved beyond any doubt. Therefore, the National Commission recommended that an independent judicial investigation should be conducted ... The rationale in this respect is that any testimony before the National Commission should not be accepted as evidence before any court in implementation of article 12 of the 1954 Law on Investigation Committee which stipulates that any testimony given during any investigation conducted under this law shall not be accepted as evidence before any civil or criminal court.

As regards the crimes of rape and sexual violence which received much attention in the international media, the National Commission investigated them in all the States of Darfur at various levels and heard a number of witnesses under oath, including the victims who were referred by the National Commission to the concerned medical services for medical examination. The National Commission had on hand the detailed reports of the judicial committees which visited the various areas of Darfur, including displaced persons' camps.

All these measures proved to the National Commission that rape and sexual violence crimes had been committed in the States of Darfur. They also proved that crimes had not been systematic or widespread constituting a crime against humanity as mentioned in the allegations. The National Commission also had proof that most of the rape crimes were filed against unknown persons, but investigations led to accusing a number of persons, including 10 members of the regular forces. The Minister of Justice lifted their immunity and they are being tried now. Most of these crimes were committed individually in the context of the prevailing security chaos. The National Commission noticed that the word "rape", with its legal and linguistic meanings, was not known to the women of Darfur in general. They believed that the meaning of the word "rape" was to use violence to compel a person to do something against that person's will, and not specifically to rape ... Unfortunately, scenes of a group rape were shot and were shown outside the Sudan. Later on it was found out that they were fictitious. Some of the persons who took part in this confessed that they were given sums of money as an incitement to play roles in those scenes ...

Forced displacement as one of the components of ethnic cleansing, which implies forced or violent displacement of an ethnic group or a group which speaks one language or has a dominant culture, from a land on which it settled legally to another area, and which has been associated throughout history with the idea of forming the "nation State", is a crime against humanity.

In the light of the above, the National Commission visited several areas in the Darfur States where, according to some allegations, forced displacement or ethnic cleansing was practised. The Commission interrogated the inhabitants of those areas and ascertained that some Arab tribal groups had attacked the Abram area, specifically the Meraya and Umm Shukah villages, displacing some non-Arab groups and settling in the area. However, the authorities, as reported by the Kas locality Commissioner, initiated measures to rectify this situation and return properties to their owners. The acts of some Arab groups led to the forced displacement of those non-Arab groups. The National Commission, therefore, believes that a judicial investigation should be conducted in order to know the conditions and circumstances which led to this situation. If the forced displacement crime is proved, legal measures should be taken against these groups because this incident constitutes a serious precedent violating customary practices and triggers similar acts worsening the problem.

The National Commission visited many of the villages which were burned in Kulbus, El Geneina, Wadi Saleh and Kas localities. The National Commission found most of them uninhabited which rendered it impossible for the National Commission to question their inhabitants. The National Commission found there some of the police forces which were deployed after the incidents in preparation for the voluntary return of the displaced persons. However, the information given by the *Shartai* and *Omdas* who accompanied the National Commission, and the evidence available, indicate that all parties were responsible, under the circumstances of the blazing conflict, for the burning of the villages. The National Commission had proof that the acts of burning were

> the direct cause of the displacement of the villages' inhabitants of various tribes, the majority of whom were Fur, to camps, such as Deleig and Kalma, near safe areas where the various services were available. Accordingly, the Commission believes that, with the exception of the above incident concerning which the Commission recommended that an investigation be conducted, the forced displacement crime was not proved.
>
> The incidents which occurred led to the displacement of big numbers of citizens. Citizens were terrified and frightened. This situation caused many citizens to leave their villages and go to the camps. The National Commission had proof that the Darfur tribes, regardless of their ethnic origin, hosted the displaced persons seeking accommodation and that no tribe settled by force in the quarters of another tribe. This was confirmed by the Nazer of Albani Helba and the Nazer of Al Habania ...

460. In its recommendations, the National Commission suggested administrative and judicial measures, in particular that the causes of the conflict should be studied and the administrative deficiency, which was one of the factors worsening the conflict, should be rectified. It further recommended that judicial investigation committees concerned with the following items be established:

(a) Allegations of extrajudicial executions at Deleig and Tenko, because there are evidences which the National Commission believes should be the subject of a detailed judicial investigation leading to trial of the persons proved to have committed the acts they are accused of, particularly as there are accusations against certain persons.

(b) Allegations that some Arab groups captured two villages of the Fur tribe in Kas locality. The Commission knew that an administrative investigation was being conducted by a committee established by the *Wali* of Southern Darfur in view of the seriousness of the accusation and its consequences which necessitate acceleration of the relevant measures.

(c) Investigating the incidents of Baram, Meleit and Kulbus, that is the killing of wounded persons in the hospitals and burning some of them alive, and taking the necessary action against perpetrators, particularly as certain names known to citizens were mentioned in the testimonies of witnesses.

461. To summarize, the executive summary states that serious violations of human rights were committed in the three Darfur States. All parties to the conflict were involved. What happened did not constitute genocide. The numbers of persons killed were exaggerated: loss of life incurred by all parties, including the armed forces and police, did not exceed a few thousand. Rape and crimes of sexual violence were committed but were not widespread or systematic enough to amount to a crime against humanity. The National Commission recommends judicial investigations into some specific incidents and the setting-up of a judicial committee to investigate property losses.

462. The Commission finds that while it is important for the National Commission to acknowledge some wrongdoings, its findings and recommendations are insufficient and inappropriate to address the gravity of the situation. Simply put, they provide too little too late. The massive scale of alleged crimes committed in Darfur is hardly captured by the report of the National Commission. As a result, the report attempts to justify the violations rather than seeking effective measures to

address them. While this is disappointing particularly to the victims of the violations, the Commission is not surprised by the tone and content of the report. The Commission is aware that the National Commission was under enormous pressure to present a view close to the Government's version of events. The report of the National Commission provides a glaring example of why it is impossible under the current circumstances in the Sudan for a national body to provide an impartial account of the situation in Darfur, let alone recommend effective measures.

2. The Parliamentary Committee of Inquiry

463. A parliamentary committee to enhance peace, security and development in the Darfur States was established in accordance with National Assembly resolution 38 of December 2003, with a membership of some 59 people. It was to meet with responsible authorities, executive bodies and other relevant personalities, as well as interview parties to the conflict. Its findings, inter alia, expressed concerns in relation to underdevelopment in Darfur and contained recommendations to improve the conditions for the internally displaced persons.

464. The Committee made recommendations in the areas of security, humanitarian aid, social structure enhancement, services and development, opening up of police posts with adequate logistics for speedy response to crises and seizure of arms in the wrong hands. To date, there has been no indication of Government compliance with the recommendations of the Parliamentary Committee to improve the conditions of the displaced, to develop social structure and generally improve services in Darfur, or compliance with its recommendation to seize arms in the wrong hands. Seizure of arms would naturally mean seizure from SLA and JEM as well as the Janjaweed, who had otherwise been given Government support.

3. The committees against rape

465. In the joint communiqué issued by the Government and the United Nations during the visit of the Secretary-General on 3 July 2004, on the situation in Darfur, the Government of the Sudan committed itself to taking concrete measures to end impunity for human rights violations in the region. Towards this end, the Government had undertaken to immediately investigate all cases of violations, including those brought to its attention by the United Nations, the African Union and other sources.

466. Allegations of rape and other incidents of sexual abuse of women were prominent among the serious violations of human rights in the region reported by multiple sources. The Minister of Justice, under powers vested in him by section 3 (2) of the Commissions of Inquiry Act, 1954, issued a decree on 28 July 2004, establishing separate rape committees for the three Darfur States.

467. The committees were composed of three members each, comprising a judge of the Appeal Court as the Chairperson, a legal counsel from the Ministry of Justice and a police officer. All members of the committees were women.

468. The mandate of the committees was to investigate the crimes of rape in the three States of Darfur. The Committees were delegated the powers of the office of

the district prosecutor to carry out their mandate.[157] The committees were required to report to the Minister of Justice within two weeks of the commencement of their work.

469. Before commenting on the working of the committees, the inadequacies of the mandate need to be addressed. The mandate of the rape committees was too narrow to address the serious allegations of violence against women. Reports of abuse suffered by women include but are not limited to rape. Excluding other forms of sexual abuse from the scope of the inquiry left a vast number of allegations unaddressed. Further, means of redress and reparation for the victims was not brought within the scope of the mandate. This limited the effectiveness of the initiative in providing comprehensive justice to victims. International law not only requires States to address violations of human rights and take measures to prevent their occurrence, but also imposes the obligation to provide an effective remedy for violations.[158]

470. The committees were not given any guidelines to ensure that methods of investigation were suited to the objective of ending impunity and facilitating the reporting by victims of the crimes committed against them. The Sudan Criminal Act and the Criminal Procedure Act do not contain substantive and procedural provisions that can be applied to the special situation of crimes committed during an armed conflict. The absence of such guidelines, including the determination of criteria for selection of cases for investigation and prosecution, left the committees without guidance as to the proper methods for investigating crimes constituting serious violations of human rights. This omission on the part of the Ministry of Justice affected the work of the committees and their ability to achieve their objectives.

471. The time allotted to the committees to carry out their work was grossly inadequate considering the immensity of the task. This indicates a lack of any serious commitment on the part of the Government to investigate the allegations of widespread rape and to end impunity for this crime.

472. During its first mission to the Sudan the Commission met the Chairpersons and members of the three rape committees in Khartoum. The Commission thanks the Government for allowing it this opportunity and the members of the committees for making themselves available for the two meetings with the Commission.

473. Members of the Commission were told that the committees began their work in the States under their respective jurisdiction on 11 August 2004. All three committees adopted a common methodology. The establishment of the committees and their arrival in the different States was announced publicly through the electronic media. The committees arranged for this announcement to be made in all the camps of displaced persons in the province and visited the camps to receive

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[157] Article 20 of the Criminal Procedure Act, 1991, empowers the Minister of Justice to grant the powers of the office of the Prosecution Attorney to any person or commission whenever he deems it to be in the interest of justice. Under article 19 of the Criminal Procedure Act, 1991, the office of the Prosecution Attorney has the powers to direct the investigation in a criminal complaint, to frame charges, to file prosecutions and to supervise the progress of the case in the court.

[158] Article 2 of the International Covenant on Civil and Political Rights. Sudan is a party to the Covenant.

complaints of rape. They also visited police stations and the office of the district attorney in order to obtain information on any cases of rape already registered.

474. In the camps the committees met with the managers of the camp and the tribal and local leaders of the population residing in the camp. Small committees were constituted in each of the camps they visited to explain the mandate of the committees and to elicit information from the displaced persons.

475. During the course of the rape committees' work, a decree was issued by the Minister of Justice on 21 August 2004, removing the requirement of registering a complaint of rape with the police before the victim could be medically examined or receive any medical treatment.

476. It is evident from their accounts that the committees received only a few complaints. Many of the cases they processed were already registered in the police stations before their arrival, or occurred during the period when they were conducting their inquiry in the respective States. The approach adopted by the Committees in proceeding with the inquiry, as explained by the three Chairpersons, was to hear a complaint, interrogate the victim to ascertain if the elements of the crime of rape as defined in the Criminal Act, 1991, were present,[159] and then require the victim to be medically examined. If the medical report corroborated the victim's allegations the case would be sent to the police for further investigation. In cases where the perpetrators were unnamed or unknown, no further investigation was conducted. Where such corroboration was available, and the perpetrator(s) was identified by the victim the cases were recommended for prosecution and sent to the office of the district prosecutor.

477. The Chairpersons of the committees informed the Commission that in Northern Darfur the Committee did not process any case in which it had received the complaint directly. That Committee had completed investigation of eight cases and sent them to the prosecutor for further action. In Western Darfur three cases were registered by the Committee on direct complaints from victims. These, together with other cases — already registered with the police before the Committee started work — investigated by the Committee were sent to the prosecutor. In Southern Darfur the Committee investigated cases that had already been registered at the police station in Nyala. The Chairpersons did not remember the total number of cases investigated by the committees in Western and Southern Darfur. The members of the committees had no documents giving the details of the cases.

478. The Advisory Council on Human Rights handed a document to the Commission in which it is stated that the three investigation committees had ended a three-week visit to the region and had submitted their interim report to the Minister of Justice in September. Together the committees had registered 50 cases, 29 in Western, 10 in Northern and 11 in Southern Darfur. Of these 35 were against unknown perpetrators. There is no information on how many of the identified accused in cases investigated by the committees were prosecuted or convicted. Details of the cases were also not made available to the Commission. Information on action taken to end impunity provided by the Advisory Council lists seven cases

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[159] Article 145 (2) of the Criminal Act, 1991, makes "penetration" essential to constitute the act of "sexual intercourse". Article 149 defines rape as an act of sexual intercourse committed on another person without her/his consent. Where the victim is in the custody or under the authority of the offender, consent shall not be relevant.

of rape in which the accused were arrested and tried; one case in which 13 accused were tried and convicted for producing fake video implicating the military in the commission of rape; two cases in which the district prosecutor, on reports made by United Nations monitors, visited camps of displaced persons and recorded statements of victims and initiated proceedings; and one case of abduction and rape registered against unknown armed opposition groups.

479. The Commission was made aware of the difficulties that the rape committees confronted in implementing their mandate and the severe constraints they experienced because of the lack of resources and technical assistance. However, the approach adopted by the committees in conducting their work could not be conducive to achieving the objectives for which they were established. The committees failed to give due consideration to the context in which they were working and to adopt an approach suitable to the circumstances. The incidents of rape they were called upon to investigate had occurred over a period of 18 months, and the affected population had been displaced, probably more than once. All the committees admitted having received complaints of rape which occurred during attacks on villages. None of the complaints was recorded or investigated. The reasons given for not taking action on such cases were non-production of victims before the Committee, absence of witnesses and failure of victims to present themselves for a medical examination or to produce a report of any earlier examination by a competent authority.

480. The committees placed undue burden on the affected population to produce evidence and did not exercise their powers to activate relevant authorities to investigate in order to overcome the gaps in information made available by victims and witnesses. The reliance on medical evidence, for instance, to initiate investigation seems highly misplaced when a majority of the complaints pertained to rape that had occurred some time previously, or where the victim was a married woman.

481. The lack of sufficient commitment to achieving their goals is apparent in several aspects of the committees' work. The first indication of the committees' failure is the lack of public response to their invitation to bring complaints. The Commission has personally received several accounts from victims in camps of the displaced alleging rape and other forms of sexual abuse suffered by women during attacks on their villages, while fleeing the villages and, more recently, around the camps where they had taken shelter. The fact that people were generally hesitant to approach the committees with their complaints indicates a lack of trust in the Government.

482. The committees were not able to mitigate that distrust by adopting an approach that inspired more confidence in their ability to provide redress to the victims. Those who did approach the committees with complaints or information on rape did not receive a response that would encourage them to believe in a meaningful outcome of the investigation. In many of the cases they did not find sufficient merit in the complaint to proceed any further. Others were considered too short on evidence to proceed with the investigation. Several of the complaints they heard were against unknown persons. Some complaints were registered with the police, but many were not registered because the complainants lost interest when they heard that the complaints could not be pursued because of the lack of identification of an accused or a suspect.

483. The committees rejected too many cases for the reason that their interrogation of the victims revealed that the crime complained of did not amount to rape, as penetration had not occurred, or that the complainants had confused the Arabic term for oppression with the term for rape and had mistakenly come forward with complaints of other forms of abuse or violence, such as beatings.

484. In discussions with the Commission on the methodology of the rape committees, the wide publicity of the mandate of the committees was greatly emphasized. In addition small committees were said to have been constituted in the camps to explain the purpose of the investigation to the affected population. In view of this the presumption that women were confused and that their complaint was not that of rape is not understandable. From its own experience of interviews with victims and witnesses, the Commission does not find this explanation convincing. Women who gave accounts to the Commission of violence committed upon them could fully understand the nature of the abuse that they had suffered, including rape.

485. It is disappointing that the committees confined themselves to the crime of rape and did not process cases in which other forms of sexual abuse, including attempt to rape, were reported. The committees lost a valuable opportunity of gathering important information on crimes committed against women by failing to record the information brought to its attention and confining the registration of cases only to those complaints which, in their assessment, could be further investigated.

486. The committees were delegated the powers to direct investigations, frame charges, file prosecutions and supervise the progress of cases in the court. The committees limited their task to receiving complaints and to sending the cases for further investigations to the police. Where the police did not pursue the investigation the committees took no action. In cases that they recommended for prosecution the committees had no information if the cases were filed or if they had resulted in conviction. They ended their work in three weeks and presented their reports to the Ministry of Justice through the Advisory Council on Human Rights. There was no involvement of the committees in any follow-up to their reports. They had not received any comments on their reports from the Ministry, nor were they involved in any follow-up to their reports.

487. If the intention of the Government was to end impunity and to establish a mechanism for facilitating reporting by victims of the crime of rape with a view to ensuring that perpetrators would be held accountable, the initiative was poorly designed and lacked the potential for achieving that objective. The Government created the committees as an immediate measure, but failed to make them effective or of any remedial value to the victims. An appraisal of the working methodology of the committees and the details of the work received from the Chairpersons reveals several lacunas. The Commission cannot agree with the Government's position that the statistics representing the work of the committees indicate a much lower incidence of the crime of rape than is reported by sources such as the United Nations, AU and other national and international organizations. The work of the rape committees does not provide a sound basis for any conclusions with regard to the incidence of rape in Darfur nor does it satisfy the requirement of State responsibility to investigate cases of serious violations of human rights and the accountability of those responsible.

VIII. Action by the rebels to remedy the violations they committed

488. Both the Government and the rebels themselves have reported to the Commission that the rebels have taken no action whatsoever to investigate and repress the international crimes committed by their members. The justifications offered by the rebels for such failure is either that no such crimes have been perpetrated, or else that they may have been committed by members of military units who were acting on their own and outside or beyond the instructions given by the political and military leaders.

Part Two
Have acts of genocide occurred?

I. The notion of genocide

489. The second task assigned to the Commission was that of establishing whether the crimes allegedly perpetrated in Darfur could be characterized as acts of genocide or whether they instead fell under other categories of international crimes.

490. As stated above, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the corresponding customary international rules require a number of specific objective and subjective elements for individual criminal responsibility for genocide to arise. The objective element is twofold. The first, relating to prohibited conduct, is as follows: the offence must take the form of: (a) killing, (b) causing serious bodily or mental harm, (c) inflicting on a group conditions of life calculated to bring about its physical destruction, (d) imposing measures intended to prevent birth within the group or (e) forcibly transferring children of the group to another group. The second objective element relates to the targeted group, which must be a national, ethnical, racial or religious group. Genocide can be charged when the prohibited conduct referred to above is taken against one of these groups or members of such group.

491. Also, the subjective element, or *mens rea*, is twofold: (a) the criminal intent required for the underlying offence (killing, causing serious bodily or mental harm, etc.) and (b) the intent to destroy, in whole or in part, the group as such. This second element is an aggravated criminal intent, or *dolus specialis*; it implies that the perpetrator consciously desired the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and knew that his acts would destroy, in whole or in part, the group as such.

492. As clarified by international case law, the intent to destroy a group in part requires the intention to destroy a considerable number of individuals[160] or a substantial part,[161] but not necessarily a very important part,[162] of the group.[163] Instances mentioned in either case law or the legal literature include, for example, the intent to kill all Muslims of Bosnia and Herzegovina, or all Muslims living in a

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[160] See *Kayishema and Ruzindana* (International Criminal Tribunal for Rwanda Trial Chamber, 21 May 1999), at para. 97.

[161] See *Jelisić* (International Tribunal for the Former Yugoslavia Trial Chamber, 14 December 1999, at para. 82), *Bagilishema* (International Criminal Tribunal for Rwanda Trial Chamber, 7 June 2001, at para. 64) and *Semanza* (Trial Chamber, 15 May 2003, at para. 316).

[162] See *Jelisić* (International Tribunal for the Former Yugoslavia Trial Chamber, 14 December 1999), at paras. 81-2.

[163] According to B. Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* (E/CN.4/Sub.2/1985/6, para. 29), the expression "in part" indicates "a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership". Interestingly, the United States, in its domestic legislation implementing the Genocide Convention, defined "substantial part" as "a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part" (*Genocide Convention Implementation Act 1987*, para. 1093 (8)).

region of that country[164] or, for example, to destroy all the Jews living in Italy or the Armenians living in France.[165]

493. Of course, this special intent must not be confused with motive, namely, the particular reason that may induce a person to engage in criminal conduct. For instance, in the case of genocide, a person intending to murder a set of persons belonging to a protected group, with the specific intent of destroying the group (in whole or in part), may be motivated by the desire to appropriate the goods belonging to that group or set of persons or by the urge to take revenge for prior attacks by members of that group or by the desire to please his superiors who despise that group. From the viewpoint of criminal law, what matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group.[166]

494. *The definition of protected groups*. While they specify the classes of prohibited conduct, international rules on genocide use a broad and loose terminology when indicating the various groups against which one can engage in acts of genocide, including references to notions that may overlap (for instance, "national" and "ethnical"). This terminology is criticized for referring to such notions as "race", which are now universally regarded as outmoded or even fallacious. Nevertheless, the principle of interpretation of international rules whereby one should give such rules their maximum effect (the principle of effectiveness, also expressed by the Latin maxim *ut res magis valeat quam pereat*) suggests that the rules on genocide should be construed in such a manner as to give them their maximum legal effect. It follows that by "national groups" one should mean those sets of individuals which have a distinctive identity in terms of nationality or national origin. On the other hand, "racial groups" comprise those sets of individuals sharing some hereditary physical traits or characteristics. "Ethnical groups" may be taken to refer to sets of individuals sharing a common language as well as common traditions or cultural heritage. The expression "religious groups" may be taken to encompass sets of individuals having the same religion, as opposed to other groups adhering to a different religion.

495. *Are tribal groups protected by international rules proscribing genocide?* In 1996 the United Nations International Law Commission, in its commentary on the Draft Code of Crimes against the Peace and Security of Mankind, stated that "the Commission was of the view that the present article [17] covered the prohibited acts when committed with the necessary intent against members of a *tribal group*" (commentary on article 17, para. 9; emphasis added). According to anthropologists, a tribe constitutes a territorial division of certain large populations based on kinship

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[164] *Krstić* (International Tribunal for the Former Yugoslavia Trial Chamber), 2 August 2001, para. 590: "[T]he physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue"; confirmed by the Appeals Chamber, judgement of 19 April 2004, paras. 6-23.

[165] W. Schabas, *Genocide in International Law* (Cambridge, Cambridge University Press, 2000), at 235, notes that the term "in part" is intended "to undermine pleas from criminals who argue that they did not intend the destruction of the group as a whole". He then notes that the Turkish Government targeted in 1915 the Armenians "within its borders, not those of the Diaspora"; the Nazis intended to destroy all the Jews living in Europe; the Rwandan extremists did not intend to eliminate the "Tutsi population beyond the country's borders".

[166] See, e.g., *Jelisić* (Appeals Chamber), 5 July 2001, para. 49.

or the belief that they descend from one ancestor: these aggregates have a chief, call themselves by one name and speak one language.[167]

496. The aforementioned view about tribal groups, which has remained isolated,[168] may be accepted on the condition that the tribal group also constitutes a distinct racial, national, ethnical or religious group. In other words, tribes as such do not constitute a protected group.[169]

497. It is apparent that the international rules on genocide are intended to protect from obliteration groups targeted not on account of their constituting a territorial unit linked by some community bonds (such as kinship, language and lineage), but only those groups — whatever their magnitude — which show the particular hallmark of sharing a religion or racial or ethnic features and which are targeted precisely on account of their distinctiveness. In sum, tribes may fall under the notion of genocide set out in international law only if, as stated above, they also exhibit the characteristics of one of the four categories of group protected by international law.

498. *The question of genocidal acts against groups that do not perfectly match the definitions of the four above-mentioned groups*. The genocide perpetrated in 1994 in Rwanda vividly showed the limitations of current international rules on genocide

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[167] See for instance L. Mair, *Primitive Government* (London, Penguin Books, 1970), pp. 7-16. Under an authoritative definition, "In its primary sense, the tribe is a community organized in terms of kinship, and its subdivisions are the intimate kindred groupings of moieties, gentes, and totem groups. Its territorial basis is rarely defined with any precision, and its institutions are typically the undifferentiated and intermittent structures of an omnifunctional social system. The leadership of the tribe is provided by the group of adult males, the lineage elders acting as tribal chiefs, the village headmen, or the shamans, or tribal magicians. These groups and individuals are the guardians of the tribal customs and of an oral tradition of law" (*The New Encyclopedia Britannica* (2003), XXV, at 1008).

[168] W. Schabas (*Genocide in International Law*, Cambridge, Cambridge University Press, 2000), after citing the statement of the International Law Commission, argues that "It is not difficult to understand why tribal groups fit within the four corners of the domain, whereas political and gender groups do not" (at p. 112). This proposition is not however supported by any legal argument.

[169] That, for the purpose of the legal notion of genocide, a tribe or a group of tribes may be regarded as the target of genocide only if it also constitutes a racial, ethnic or religious group is borne out by the ruling of the Australian Federal Court in 1999 in *Nulyarimma* v. *Thompson* and *Buzzacott* v. *Hill* with regard to Aboriginal groups or tribes. Some Aboriginal persons had claimed that conduct engaged in by certain ministers of the Commonwealth or Commonwealth parliamentarians were contributing to the destruction of the Aboriginal people as an ethnic or racial group. The Court dismissed the claim. The majority of judges held that the legal ground for dismissal was that the legal notion of genocide could not be acted upon in the Australian legal system for lack of the necessary domestic legislation. Judge Merkel opined instead that genocide could be acted upon within the domestic legal system of Australia, although in his view *in casu* the claim was nevertheless groundless on its merits because "cultural genocide" was not covered either by customary international law or the 1948 Convention. What is interesting for our purposes is, however, that none of the three judges held that the Aboriginals could not be legitimately held to be a target group under the proper notion of genocide. In other words, the three judges implicitly supported the view that Australian Aboriginal tribes or units did constitute a racially and ethnically distinct group on account of their ethnicity, religion, culture, language and colour.

According to *The Encyclopedia Britannica*, vol. 1, at pp. 714-5, and vol. 14, at pp. 434-9, the Australian Aboriginal society is divided up in tribes or language-named groups based on land ownership and kinship.

and obliged the judges of the International Criminal Tribunal for Rwanda to place an innovative interpretation on those rules. The fact is that the Tutsi and the Hutu do not constitute at first glance distinct ethnic, racial, religious or national groups. They have the same language, culture and religion, as well as basically the same physical traits. In *Akayesu*, the Trial Chamber emphasized that the two groups were nevertheless distinct because (a) they had been made distinct by the Belgian colonizers when they established a system of identity cards differentiating between the two groups (para. 702), and (b) the distinction was confirmed by the self-perception of the members of each group. As the Trial Chamber pointed out, "all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity" (ibid.). The Trial Chamber also insisted that what was required by the international rules on genocide was that the targeted group be a stable and permanent group, constituted in a permanent fashion and membership of which is determined by birth and be identifiable as such (paras. 511 and 702). The objective criterion of a "stable and permanent group", which, if considered per se, could be held to be rather questionable, was supplemented in the case law of the International Criminal Tribunal for Rwanda (and subsequently in that of the International Tribunal for the Former Yugoslavia) by the subjective standard of perception and self-perception as a member of a group.[170] According to the case law, in case of doubt one should also establish whether (a) a set of persons is perceived and in fact treated as belonging to one of the protected groups, and in addition (b) they consider themselves as belonging to one of such groups.[171]

499. In short, the approach taken to determine whether a group is a (fully) protected one has evolved from an objective to a subjective standard to take into account that "collective identities, and in particular ethnicity, are by their very nature social constructs, 'imagined' identities entirely dependent on variable and contingent perceptions, and *not* social facts, which are verifiable in the same manner as natural phenomena or physical facts".[172]

500. It would seem that the subjective test may usefully supplement and develop, or at least elaborate upon, the standard laid down in the 1948 Convention and the

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[170] See *Kayishema and Ruzindana*, at para. 98, *Musema*, at para. 161, *Rutaganda*, at para. 56, as well as the International Tribunal for the Former Yugoslavia, *Jelisić* (Trial Chamber), at paras. 70-71 and *Krstić* (Trial Chamber), at paras. 556-7 and 559-60).

[171] In *Kayishema and Ruzindana* the subjective test was only held to be applicable to the notion of ethnic group ("An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or a group identified as such by others, including perpetrators of crimes (identification by others)"; at para. 98). The subjective test was instead considered applicable to any group protected by the Convention (and customary law) by the International Tribunal for the Former Yugoslavia Trial Chamber in *Jelisić* (at paras. 70-71: "A group may be stigmatised [...] by way of positive or negative criteria. A "positive approach" would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A "negative approach" would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group."), as well as by a Trial Chamber of the International Criminal Tribunal for Rwanda in *Musema* (at para. 161), and *Rutaganda* (at para. 56).

[172] G. Verdirame, "The genocide definition in the jurisprudence of the ad hoc tribunals", 49 *International and Comparative Law Quarterly* (2000), at 592.

corresponding customary rules on genocide. Indeed, the criteria initially used by courts to interpret and apply those treaty provisions and customary rules have proved either too loose or too rigid; in short, they were unable to take account of situations where manifestly there existed a stark opposition and conflict between two distinct sets of persons, one of which carried out the *actus reus* typical of genocide with the intent to destroy the other in whole or in part. Moreover, it would be erroneous to underestimate one crucial factor: the process of formation of a perception and self-perception of another group as distinct (on ethnic, national, religious or racial grounds). While on historical and social grounds this may begin as a subjective view, as a way of regarding the others as making up a different and opposed group, it gradually hardens and crystallizes into a real and factual opposition. It thus leads to an objective contrast. The conflict thus from subjective becomes objective. It ultimately brings about the formation of two conflicting groups, one of them intent on destroying the other.

501. What matters from a legal point of view is the fact that the interpretative expansion of one of the elements of the notion of genocide (the concept of protected group) by the two International Tribunals is in line with the object and scope of the rules on genocide (to protect from deliberate annihilation essentially stable and permanent human groups, which can be differentiated on one of the grounds contemplated by the Convention and the corresponding customary rules). In addition, this expansive interpretation does not substantially depart from the text of the Genocide Convention and the corresponding customary rules because it, too, hinges on four categories of groups, which, however, are no longer identified only by their objective connotations but also on the basis of the subjective perceptions of members of groups. Finally, and perhaps more importantly, this broad interpretation has not been challenged by States. It may therefore be safely held that that interpretation and expansion has become part and parcel of international customary law.

502. *Proof of genocidal intent*. Whenever direct evidence of genocidal intent is lacking, as is mostly the case, intent can be inferred from many acts and manifestations or factual circumstances.[173] In Jelisić, the Appeals Chamber noted that "as to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same

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[173] See *Jelisić* (Appeals Chamber), at para. 47; *Rutaganda* (Appeals Chamber), at para. 528; *Krstić* (Appeals Chamber), at para. 34. A number of factors from which intent may be inferred were mentioned in *Akayesu* (paras. 523-4: "the general context of the perpetration of other culpable acts systematically directed against that same group, whether ... committed by the same offender or by others"; "the scale of atrocities committed"; the "general nature" of the atrocities committed "in a region or a country"; "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups"; "the general political doctrine which gave rise to the acts"; "the repetition of destructive and discriminatory acts" or "the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group — acts which are not in themselves covered by the list ... but which are committed as part of the same pattern of conduct"), in *Musema* (para. 166) as well as *Kayishema and Ruzindana* (paras. 93 and 527) "the number of group members affected"; "the physical targeting of the group or their property"; "the use of derogatory language toward members of the targeted group"; "the weapons employed and the extent of bodily injury"; "the methodical way of planning"; "the systematic manner of killing"; and "the relative proportionate scale of the actual or attempted destruction of a group".

group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts".

503. Courts and other bodies charged with establishing whether genocide has occurred must however be very careful in the determination of the subjective intent. As the International Tribunal for the Former Yugoslavia Appeals Chamber rightly put it in *Krstić* (appeal), "genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirements of specific intent. Convictions for genocide can be entered only where intent has been unequivocally established" (judgement of 19 April 2004, at para. 134). On this ground the Appeals Chamber, finding that the Trial Chamber had erred in demonstrating that the accused possessed genocidal intent, reversed the Trial Chamber's conviction of genocide and sentenced Krstić for complicity in genocide.

504. Similarly, States have shown caution when defining genocidal intent with regard to particular events, as is shown, for instance, by the position the Canadian authorities took in 1999 with regard to the question of the mass killing of Kosovo Albanians by the armed forces of the central authorities of the Federal Republic of Yugoslavia in the internal armed conflict between Kosovo and the Government of the Federal Republic of Yugoslavia.[174]

505. *Is genocide graver than other international crimes?* It has been widely held that genocide is the most serious international crime. In *Kambanda* (para. 16) and *Serushago* (para. 15), the International Criminal Tribunal for Rwanda defined it as "the crime of crimes" (but see below). In *Krstić*, the International Tribunal for the Former Yugoslavia Appeals Chamber stated: "Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity" (para. 36).

506. It is indisputable that genocide bears a special stigma, for it is aimed at the physical obliteration of human groups. However, one should not be blind to the fact that some categories of crimes against humanity may be similarly heinous and carry a similarly grave stigma. In fact, the Appeals Chamber of the International Criminal Tribunal for Rwanda reversed the view that genocide was the "crime of crimes". In *Kayishema and Ruyindana*, the accused alleged that the Trial Chamber had erred in finding that genocide was the "crime of crimes" because there was no such hierarchical gradation of crimes. The Appeals Chamber agreed: "The Appeals

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[174] In a memorandum of 30 March 1999, the Legal Bureau of the Canadian Department of Foreign Affairs pointed out first that in the case of the Kosovo Albanians one element of genocide was present ("targeting a group on the basis of ethnicity"). Then, after noting that so-called ethnic cleansing had been expressly excluded from the Genocide Convention in the 1948 negotiations, it pointed that that such notion (namely, the forcible expulsion of person from their homes in order to escape the threat of subsequent ill-treatment), showed an intent different from the "intent to destroy". It went on note that "Ethnic Albanians are being killed and injured *in order to drive them from their homes*, not in order *to destroy them as a group, in whole or in part*" (in 37 *Canadian Yearbook of International Law* 1999, at 328; emphasis in the original).

Chamber remarks that there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are 'serious violations of international humanitarian law', capable of attracting the same sentence."[175]

II. Do the crimes perpetrated in Darfur constitute acts of genocide?

507. *General.* There is no doubt that some of the objective elements of genocide materialized in Darfur. As discussed above, the Commission has collected substantial and reliable material which tends to show the occurrence of systematic killing of civilians belonging to particular tribes, of large-scale causation of serious bodily or mental harm to members of the population belonging to certain tribes and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part (for example, by systematically destroying their villages and crops, by expelling them from their homes and by looting their cattle). However, two other constitutive elements of genocide require a more in-depth analysis, namely, whether the target groups amount to one of the groups protected by international law and, if so, whether the crimes were committed with a genocidal intent. These elements are considered separately below.

508. *Do members of tribes that are victims of attacks and killing objectively constitute a protected group?* The various tribes that have been the object of attacks and killings (chiefly the Fur, Masalit and Zaghawa tribes) do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Islam). In addition, owing to the high incidence of intermarriage, they can hardly be distinguished in their outward physical appearance from the members of tribes that allegedly attacked them. Furthermore, intermarriage and coexistence in both social and economic terms have over the years tended to blur the distinction between the groups. Apparently, the sedentary and nomadic character of the groups constitutes one of the main distinctions between them. It is also notable that members of the African tribes speak their own dialects in addition to Arabic, while members of Arab tribes speak only Arabic.

509. *If not, may one hold that they subjectively constitute distinct groups?* If objectively the two sets of persons at issue do not constitute two distinct protected groups, the question arises as to whether they may nevertheless be regarded as such subjectively in that they perceive each other and themselves as constituting distinct groups.

510. As noted above, in recent years the perception of differences has heightened and has extended to distinctions that earlier were not the predominant basis for identity. The rifts between tribes and the political polarization around the rebel opposition to the central authorities have been extended to issues of identity. Those tribes in Darfur which support rebels have increasingly come to be identified as

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[175] Note, however, that the Appeals Chamber concluded that the Trial Chamber had made no reversible error: "The Appeals Chamber finds that the Trial Chamber's description of genocide as the 'crime of crimes' was at the level of general appreciation, and did not impact on the sentence it imposed" (para. 367). See also *Semanya*, International Criminal Tribunal for Rwanda Trial Chamber, para. 555.

"African" and those supporting the Government as "Arab". Clearly, however, not all "African" tribes support the rebels and not all "Arab" tribes support the Government. Some so-called Arab tribes appear to be either neutral or even support the rebels. For example, the Gimmer, a pro-Government African tribe, is seen by the African tribes opposed to the Government as having been Arabized. Other measures contributing to a polarization of the two groups include the 1987-1989 conflict over access to grazing lands and water sources between nomads of Arab origin and the sedentary Fur. The Arab-African divide has also been fanned by the growing insistence on such a divide in some circles and in the media. All this has contributed to the consolidation of the contrast and gradually created a marked polarization in the perception and self-perception of the groups concerned. At least those most affected by the conditions explained above, including those directly affected by the conflict, have come to perceive themselves as either African or Arab.

511. There are other elements that tend to indicate the self-perception of two distinct groups. In many cases militias attacking "African" villages tend to use derogatory epithets, such as "slaves", "blacks", *nuba*, or *zurga*, which might imply a perception of the victims as members of a distinct group. However, in numerous other instances they use derogatory language that is not linked to ethnicity or race.[176] As for the victims, they often refer to their attackers as Janjaweed, a derogatory term that normally designates "a man (a devil) with a gun on a horse". However, in this case the term Janjaweed clearly refers to "militias of *Arab* tribes on horseback or camelback". In other words, the victims perceive the attackers as persons belonging to a different and hostile group.

512. For these reasons it may be considered that the tribes that have been victims of attacks and killings subjectively make up a protected group.

513. *Was there a genocidal intent?* Some elements emerging from the facts, including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of the genocidal intent. However, there are other more indicative elements that show a lack of genocidal intent. An important element is the fact that in a number of villages attacked and burned by both militias and Government forces, the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men. A telling example is the attack of 22 January 2004 on

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[176] Epithets that eyewitnesses or victims reported to the Commission include the following: "This is your end. The Government armed me." "You are Masalit, why do you come here, why do you take our grass? You will not take anything today." "You will not stay in this country." "Destroy the *Torabora*." "You are Zaghawa tribes, you are slaves." "Where are your fathers, we would like to shoot and kill them." "Take your cattle, go away and leave the village." In an attack of 1 November 2003 on the village of Bir-Saliba (in the region of Sirba, Kulbus), a witness heard the attackers yell "Allah Akbar, we are going to evict you Nyanya" and explained that "Nyanya" in their dialect is the name of the poison used to kill insects (however, this derogatory term was probably also used as a reference to the rebel organization in the South that existed before the establishment of SPLA, and was called Nyanya).
During rape: "You are the mother of the people who are killing our people." "Do not cut the grass because the camels use it." "You sons of *Torabora* we are going to kill you." "You do not have the right to be educated and must be *Torabora*" (to an 18-year-old student of a boarding school): "You are not allowed to take this money to fathers that are real *Torabora*". (To a girl from whom the soldier who raped her also took all her money): "You are very cheap people, you have to be killed".

Wadi Saieh, a group of 25 villages inhabited by about 11,000 Fur. According to credible accounts of eyewitnesses questioned by the Commission, after occupying the villages, the Government Commissioner and the leader of the Arab militias that had participated in the attack and burning gathered all those who had survived or had not managed to escape into a large area. Using a microphone, they selected 15 persons (whose names they read from a written list), as well as 7 *omdas* (local leaders), and executed them on the spot. They then sent many men, including all elderly men, all boys and all women to a nearby village where they held them for some time, whereas they executed 205 young villagers who they asserted were rebels (*Torabora*). According to male survivors interviewed by the Commission, about 800 persons were not killed (most of the young men spared by the attackers were detained for some time in the Mukjar prison).

514. This case clearly shows that the intent of the attackers was not to destroy an ethnic group as such or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among or getting support from the local population.

515. Another element that tends to show the Sudanese Government's lack of genocidal intent can be seen in the fact that persons forcibly dislodged from their villages are collected in camps for internally displaced persons. In other words, the populations surviving attacks on villages are not killed outright in an effort to eradicate the group; rather, they are forced to abandon their homes and live together in areas selected by the Government. While this attitude of the Government of the Sudan may be held to be in breach of international legal standards on human rights and rules of international criminal law, it is not indicative of any intent to annihilate the group. This is all the more true because the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the internally displaced persons belong. Suffice it to note that the Government of the Sudan generally allows humanitarian organizations to help the population in camps by providing food, clean water, medicine and logistical assistance (construction of hospitals, cooking facilities, latrines, etc.).

516. Another element that tends to show a lack of genocidal intent is the fact that in contrast with other instances described above, in a number of instances villages with a mixed composition (African and Arab tribes) have not been attacked. This holds true, for instance, for the village of Abaata (north-east of Zalinguei in Western Darfur), consisting of Zaghawa and members of Arab tribes.

517. Furthermore, it has been reported by a reliable source that one inhabitant of the Jabir village (situated about 150 km from Abu Shouk Camp) was among the victims of an attack carried out by Janjaweed on the village on 16 March 2004. He stated that he did not resist when the attackers took 200 camels from him, although they beat him up with the butts of their guns. Prior to his beating, however, his younger brother, who possessed only one camel, had resisted when the attackers had tried to take his camel, and he had been shot dead. Clearly, in this instance the special intent to kill a member of a group to destroy the group as such was lacking, the murder being motivated only by the desire to appropriate cattle belonging to the inhabitants of the village. Irrespective of the motive, had the attackers' intent been to annihilate the group, they would not have spared one of the brothers.

518. *Conclusion.* On the basis of the foregoing observations, the Commission concludes that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, causing serious bodily or mental harm or deliberately inflicting conditions of life likely to bring about physical destruction, and second, on the basis of a subjective standard, the existence of a protected group being targeted by the perpetrators of criminal conduct. Recent developments have led to the perception and self-perception of members of African tribes and members of Arab tribes as making up two distinct ethnic groups. However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking, the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes primarily for purposes of counter-insurgency warfare.

519. However, as pointed out above, the Government also entertained the intent to drive a particular group out of an area on persecutory and discriminatory grounds for political reasons. In the case of Darfur, this discriminatory and persecutory intent may be found, on many occasions, in some Arab militias, as well as in the central Government: the systematic attacks on villages inhabited by civilians (or mostly by civilians) belonging to some "African" tribes (Fur, Masalit and Zaghawa), the systematic destruction and burning down of those villages and the forced displacement of civilians from the villages attest to a manifestly persecutory intent. In this respect, in addition to murder as a crime against humanity, the Government may be held responsible for persecution as a crime against humanity. This would not affect the conclusion of the Commission that the Government of the Sudan has not pursued a policy of genocide in Darfur.

520. One should not rule out the possibility that in some instances single individuals, including Government officials, may entertain a genocidal intent or, in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group.[177] If any single individual, including any Government official, has such an intent, it would be up to a competent court to make such a determination on a case-by-case basis. Should the court determine that in some instances certain individuals pursued a genocidal intent, the issue would arise of establishing any criminal responsibility of senior officials either for complicity in genocide or for failure to investigate, or to suppress and punish, such possible acts of genocide.

521. Similarly, it would be for a competent court to determine whether some individual members of the militias supported by the Government, or even single Government officials, pursued a policy of extermination as a crime against humanity or whether the murder of civilians was so widespread and systematic as to acquire the legal features proper to extermination as a crime against humanity.

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[177] As the Appeals Chamber of the International Criminal Tribunal for Rwanda rightly noted in *Kayishema and Ruzindana*, "genocide is not a crime that can only be committed by certain categories of persons. As evidenced by history, it is a crime which has been committed by the low-level executioner and the high-level planner or instigator alike" (at para. 170).

522. The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or though the militias under their control, should not be taken as in any way detracting from or belittling the gravity of the crimes perpetrated in that region. As stated above, genocide is not necessarily the most serious international crime. Depending on the circumstances, such international offences as crimes against humanity or large-scale war crimes may be no less serious and heinous than genocide. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale and have so far gone unpunished.

Part Three
Identification of the possible perpetrators of international crimes

I. General

523. The Commission has satisfied itself, on the basis of credible probative information which it has collected or which has been rendered to it and which is consistent with reports from various reliable sources, that a number of persons may be suspected of bearing responsibility for crimes committed in Darfur. Although the heads of responsibility may vary, the probative elements (both documentary and testimonial) that the Commission has gathered are sufficient to indicate a number of persons as being possibly responsible for those crimes.

524. As mentioned earlier in the present report, in identifying perpetrators the Commission has decided that the most appropriate standard was that of requiring a reliable body of material consistent with other verified circumstances which tends to show that a person may reasonably be suspected of being involved in the commission of a crime. The Commission does not therefore make final judgements as to criminal guilt; rather, it makes an assessment of possible suspects that will pave the way for future investigations and possible indictments by a prosecutor and convictions by a court of law.

525. The Commission has, however, decided to withhold the names of these persons from the public domain. It will instead include them in a sealed file that will be placed in the custody of the Secretary-General. The Commission recommends that the file be handed over to a competent prosecutor (the Prosecutor of the International Criminal Court) who would use the material as he or she deemed fit. A distinct and voluminous sealed file containing all the evidentiary material collected by the Commission will be handed over to the United Nations High Commissioner for Human Rights. That file should also be delivered to a competent prosecutor.

526. The decision to keep confidential the names of persons suspected of being responsible for international crimes in Darfur is based on three main grounds. First, it would be contrary to elementary principles of due process or fair trial to make the names of those individuals public. In this connection, it bears emphasizing the provisions of article 14 of the International Covenant on Civil and Political Rights and article 55 (2) of the Statute of the International Criminal Court,[178] which

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[178] "Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have [in addition to the rights enumerated in article 55 (1)] the following rights of which he or she shall be informed prior to being questioned:

"(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

"(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

"(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it;

"(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

concern the rights of persons under investigation and which may be reasonably held to codify customary international law. Those rights include the right to be informed that there are grounds to believe that the person has committed a crime, the right to remain silent and the right to have legal assistance. Publication of the names could deprive the possible perpetrators of the fundamental rights that any suspect must enjoy.

527. The aforementioned ground for withholding the names of persons suspected of responsibility is particularly valid considering that the situation in Darfur is currently subject to intense scrutiny by the international community. Were the Commission to name those persons, the world media might indeed be inclined to jump to conclusions and hold that such persons were guilty outright, and not simply suspected of bearing responsibility.

528. The second and related ground on which the Commission deems it indispensable to withhold names is linked to the nature of the mission discharged by the Commission. As pointed out above, the Commission has not been vested with prosecutorial or investigative functions. It has therefore confined itself to collecting reliable information about persons who might be suspected of being responsible for crimes in Darfur. Most of the persons the Commission interviewed participated on the understanding that confidentiality would be respected. The Commission therefore did not take signed witness statements, but rather made careful accounts of the testimony given by witnesses. In addition to witness accounts, it collected police reports, judicial decisions, hospital records and the like. It also verified crime scenes (checking for consistency with witness versions, photographing and mapping and assessing grave sites). The Commission has thus gathered information that allows it to take a first step in the direction of ensuring accountability for the crimes committed in Darfur by pointing out to the appropriate prosecutorial and judicial authorities those who deserve thorough investigation. However, the information it has gathered would be misused if the names were to be published, as that could lead to premature judgements about criminal guilt that would not only be unfair to the suspect, but would also jeopardize the entire process undertaken to fight impunity.

529. The third ground for confidentiality is the need to protect witnesses heard by the Commission (as well as prospective witnesses). In many instances it would not be difficult for those who are suspected of bearing responsibility to identify witnesses who have spoken to the Commission and to intimidate, harass or even kill them. It is for this reason that not only will the names of possible perpetrators be withheld, but also the names of witnesses questioned by the Commission, as well as other reliable sources of probative material. Those names will be included in the sealed file, which, as stated above, shall be handed over only to the prosecutor.

530. To render any discussion on perpetrators intelligible, two legal tools are necessary: the categories of crimes for which they may be responsible and the enumeration of the various modes of participation in international crimes for which the various persons are suspected of bearing responsibility. Since the categories of international crimes have been listed elsewhere in the report, it may suffice here to recall briefly the various modes of participation in international crimes that give rise to individual criminal responsibility. In this context, the Commission's findings on possible perpetrators is presented in the most anonymous yet comprehensive way possible.

531. The Commission notes at the outset that it has identified 10 high-ranking central Government officials, 17 Government officials operating at the local level in Darfur, 14 members of the Janjaweed, 7 members of various rebel groups and 3 officers of a foreign army (who participated in their individual capacity in the conflict) who are suspected of bearing individual criminal responsibility for the crimes committed in Darfur.

532. The Commission's mention of the number of individuals it has identified should not, however, be taken as an indication that the list is exhaustive. First, the Commission has collected numerous names of other possible Janjaweed perpetrators who have been identified by one eyewitness as participants or leaders of an attack. The names of those individuals will be included in the sealed body of evidentiary material handed over to the United Nations High Commissioner for Human Rights for transmittal to the judicial accountability mechanism decided upon by the Security Council. Furthermore, and importantly, the Commission has gathered substantial material on various influential individuals, institutions, groups of persons or committees that have played a significant role in the conflict in Darfur, including planning, ordering, authorizing and encouraging attacks. These include but are not limited to the military, the National Security and Intelligence Service, Military Intelligence and the Security Committees in the three States of Darfur. Those institutions should be carefully investigated so as to determine the possible criminal responsibility of individuals taking part in their activities and deliberations.

II. Modes of criminal liability for international crimes

A. Perpetration or co-perpetration of international crimes

533. Under international criminal law all those who, individually or jointly, engage in conduct considered to be prohibited and criminalized bear individual criminal liability for their conduct if the requisite *mens rea* is present. Furthermore, a person may commit a crime by omission in cases where he or she has a duty to act.[179]

1. Government of the Sudan

534. The Commission has identified six officials of the Government of the Sudan who participated directly in the commission of an international crime in Darfur. Five of those individuals, members of the armed forces operating in Darfur or civilian officials of the local Government in one of the three States of Darfur, led or otherwise participated in attacks against civilians, leading to the forcible displacement of the affected villagers from their homes. In addition to the possibility of being held responsible, under the doctrine of joint criminal enterprise, for crimes committed by others during the attacks, those individuals are suspected of having carried out indiscriminate attacks against civilians, a war crime. One official is suspected of having committed the crime of torture, a crime against humanity, against various detained individuals suspected of rebel activities.

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[179] See *Rutaganda*, International Criminal Tribunal for Rwanda Trial Chamber, para. 41; and *Kunarac, Kovac and Vuković*, International Criminal Tribunal for the Former Yugoslavia Trial Chamber, para. 390, citing *Tadić*, Appeals Chamber, para. 188.

2. Janjaweed

535. The Commission has collected reliable material tending to show that 14 members of the Janjaweed participated directly in the commission of an international crime in Darfur. Those individuals were identified by eyewitnesses as having participated in an attack on a village, which often involved burning, looting, killing and sometimes rape. In addition to the possibility of being held responsible, under the doctrine of joint criminal enterprise, for crimes committed by others during the attacks, those individuals may be held responsible as direct perpetrators in connection with the crimes they undeniably committed. Some of them are suspected of having committed various crimes simultaneously. Of the Janjaweed identified as perpetrators by the Commission, all of them are suspected of having carried out indiscriminate attacks on civilians, a war crime. In addition, one is suspected of having participated in the illegal detention of civilians and two are suspected in the murder of civilians, which are crimes against humanity.

3. Rebels

536. Three members of rebel groups were identified by eyewitnesses as having participated in an attack on a village where looting, abduction, destruction and killing occurred. In addition to the possibility of being held responsible, under the doctrine of joint criminal enterprise, for crimes committed by others during the attacks, those individuals may be held responsible as direct perpetrators in connection with the crimes they undeniably committed. In this case, they are suspected of having committed indiscriminate attacks on civilians, a war crime.

4. Foreign army officers, participating in their personal capacity

537. Three foreign army officers were identified by eyewitnesses as having participated in an attack on a village where looting, destruction and killing occurred. In addition to the possibility of being held responsible, under the doctrine of joint criminal enterprise, for crimes committed by others during the attacks, those individuals may be held responsible as direct perpetrators in connection with the crimes they undeniably committed. In this case, they are suspected of having carried out indiscriminate attacks on civilians, a war crime.

B. Joint criminal enterprise for the commission of international crimes

538. As is the case with most national penal systems, international criminal law does not hold criminally liable only those persons who, either alone or jointly with other persons, physically commit international crimes. International law also criminalizes the conduct of all those who participate in varying degrees in the commission of crimes, without necessarily performing the same acts. The notions of planning, ordering, instigating, aiding and abetting a crime are discussed below. International law, as has been held in various cases,[180] also upholds the notion of

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[180] See *Tadić appeals judgement* (1999), at paras. 185-229, the Trial Chamber decision in *Brdjanin and Tadić* (*Decision on Form of Further Amended Indictment and Prosecution Application to Amend*), of 26 June 2001, at paras. 22-49. See also the Trial Chamber judgement in *Kordić and Čerkez* (judgement of 26 February 2001), at paras. 393-400; *Krstić* (judgement of 2 August 2001, at paras. 611-646); *Kvocka and others* (judgement of 2 November 2001, at paras. 265-318); and *Vasiljević* (judgement of 29 November 2002), at paras. 63-69.

joint criminal enterprise or of "common purpose" or "common design", and thus criminalizes the acts of a multitude of individuals who undertake actions that could not be carried out singly but perforce require the participation of more than one person. Indeed, in international criminal law the notion of joint criminal enterprise acquires greater significance than in most national legal systems, for most international crimes (crimes against humanity, genocide and most war crimes) are offences for which the final criminal result may be achieved only through the involvement of many persons. This being the case, it would be illogical and inconsistent to punish only the person who is at the end of the chain, the man who pulls the trigger. All those who, in varying degrees, participate in the accomplishment of the final result must bear responsibility, or, as a Trial Chamber of the International Tribunal for the Former Yugoslavia put it: "If the agreed crime is committed by one or other of the participants in the joint criminal enterprise, all of the participants in that enterprise are guilty of the crime regardless of the part played by each in its commission."[181]

539. In order for criminal liability for joint criminal enterprise to arise, the following conditions must be present: (a) a plurality of persons; (b) the existence of a common plan involving the commission of an international crime (the need for, design of or purpose of the plan need not be previously arranged or formulated, but "may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise");[182] and (c) participation of the accused persons in the execution of the common plan.

540. There may be two principal modalities of participation in a joint criminal enterprise for the commission of international crimes.[183] First, there may be a multitude of persons participating in the commission of a crime who share from the outset a common criminal design (to kill civilians indiscriminately, to bomb hospitals, etc.). In this case, all of them are equally responsible under criminal law, although their role and function in the commission of the crime may differ (one person planned the attack, another issued the order to the subordinates to take all the preparatory steps necessary for undertaking the attack, others physically carried out the attack and so on). The crucial factor is that the participants voluntarily took part in the common design and intended the result. Of course, depending on the importance of the role played by each participant, their position may vary at the level of sentencing and international judges may pass different sentences. Nevertheless, they are all equally liable under criminal law.[184]

541. There may be another major form of joint criminal liability. It may happen that while a multitude of persons share from the outset the same criminal design, one or more perpetrators commit a crime that had not been agreed upon or envisaged at the beginning, either expressly or implicitly, and therefore did not constitute part and parcel of the joint criminal enterprise. For example, a military unit, acting under

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[181] *Krnojelac*, International Tribunal for the Former Yugoslavia Trial Chamber, 15 March 2002, para. 82.

[182] See *Tadić* (*Appeal*), 1999, at para. 227.

[183] Although the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, in *Tadić* (*Appeal*), 1999 (at paras. 196, 202-204) found that the case law points to three different categories, in fact they boil down to two, for the first two are similar.

[184] On this class of joint criminal enterprise see *Tadić* (*Appeal*), 1999, at para. 196; *Krstić* (judgement of 2 August 2001, at paras. 611-646); *Kvocka and others* (judgement of 2 November 2001, at paras. 265-318); *Vasiljević* (judgement of 29 November 2002), at paras. 63-69.

superior orders, sets out to detain, contrary to international law, a number of enemy civilians. One of the servicemen, in the heat of military action, kills or tortures one of those civilians. In that case, the problem arises of whether the participants in the group other than the one who committed the crime, which had not been previously planned or envisaged, also bear criminal responsibility for such crime. As held in the relevant case law,[185] the responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, it was foreseeable that such a crime might be perpetrated by one or other members of the group and the accused willingly took that risk. In this example, and depending on the circumstances of each case, a court would have to determine whether it was foreseeable that the detention at gunpoint of enemy civilians might result in death or torture.

1. Government of the Sudan

542. The Commission has identified six members of the central Government of the Sudan who are suspected of having committed an international crime under the notion of joint criminal enterprise. Some are members of the Sudanese armed forces and some are high officials of the central Government in Khartoum. Considering that the crimes committed in Darfur were widespread and based on an overall policy, those persons, in their official capacity and in the exercise of their functions, acted in ways that contributed to the commission of crimes in Darfur. Depending on the circumstances of each case, those individuals can thus be suspected, under the doctrine of joint criminal enterprise, of having committed the crimes against humanity of the murder of civilians and forced displacement and the war crimes of indiscriminate attacks on civilians and destruction of civilian objects. Three of them are also suspected of being responsible under the doctrine of joint criminal enterprise for the crime of enforced disappearance, a crime against humanity.

543. The Commission has also identified eight local Government officials or members of the armed forces operating in Darfur who are suspected of having committed international crimes under the doctrine of joint criminal enterprise. Three contributed by their actions to the detention and execution of civilians. The five others, as noted above, were identified by eyewitnesses as having participated in an attack on a village, which often involved burning, looting and killing. Depending on the circumstances of each case, those individuals can thus be suspected, under the doctrine of joint criminal enterprise, of having committed the crimes against humanity of the murder of civilians, the forcible confinement of civilians and forced displacement, and the war crime of destruction of civilian objects.

2. Janjaweed

544. The Commission has identified 14 Janjaweed who are suspected of having committed an international crime under the notion of joint criminal enterprise. Those individuals were identified by eyewitnesses as having participated in an attack on a village, which often involved burning, looting, killing and sometimes rape. Depending on the circumstances of each case, those individuals can thus be suspected, under the doctrine of joint criminal enterprise, of having committed the crimes against humanity of the murder of civilians and the rape, torture and forcible displacement of civilians and the war crimes of carrying out indiscriminate attacks on civilians, destruction of civilian objects and looting.

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[185] See the ICTY Appeals Chamber's judgement in *Tadić (Appeal)*, 1999, at para. 228.

3. Rebels

545. Three members of the rebel groups were identified by eyewitnesses as having participated in an attack on a village where looting, abduction, destruction and killing occurred. Those individuals, depending on the circumstances, may be responsible, under the doctrine of joint criminal enterprise, for war crimes committed during the attacks, namely, the murder of civilians, the destruction of civilian objects, the unlawful detention of civilians and looting.

4. Foreign army officers (acting in their personal capacity)

546. Three foreign army officers were identified by eyewitnesses as having participated in an attack on a village where looting, destruction and killing occurred. Those individuals may be responsible, under the doctrine of joint criminal enterprise, for war crimes committed during the attacks, namely, the murder of civilians, the destruction of civilian objects and looting.

C. Aiding and abetting in the commission of international crimes

547. Under international case law,[186] aiding and abetting in the commission of crime involves a person (the accessory) giving practical assistance (including the provision of arms), encouragement or moral support to the perpetrator of the main crime (the principal) and such assistance having a substantial effect on the perpetration of the crime. The subjective element, or *mens rea*, resides in the accessory having knowledge that his actions assist the perpetrator in the commission of the crime.[187]

1. Government of the Sudan

548. The Commission has identified six central Government officials who are suspected of having aided and abetted in the commission of international crimes in

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[186] See the decisions by the International Criminal Tribunal for Rwanda in *Akayesu* (paras. 704-5) and *Musema* (para. 126) and by the International Tribunal for the Former Yugoslavia in *Furundžija* (paras. 190-249) and *Kunarac and others* (para. 391).

[187] The distinction between responsibility for aiding and abetting and responsibility for joint criminal enterprise was explained in *Tadić*, Appeals Chamber, para. 229:

> "(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.
> (ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.
> (iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.
> (iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above."

Darfur by recruiting, arming, providing financial support to or otherwise aiding and abetting the Janjaweed in the commission of crimes against humanity, including the murder of civilians, forced displacement and rape, and war crimes, including indiscriminate attacks on civilians, destruction of civilian objects and looting. The Commission notes that a pattern of looting and rape by the Janjaweed has clearly emerged during the conflict in Darfur, a fact which could not have been ignored by those identified by the Commission. By continuing their actions nonetheless, they may be suspected of having aided and abetted the Janjaweed in looting and raping.

549. For the same reasons, the Commission has identified seven local government officials or members of the armed forces operating in Darfur who are suspected of having aided and abetted the Janjaweed in the commission of the crimes noted above.

2. Janjaweed

550. The Commission has identified four Janjaweed who are suspected of having aided and abetted in the commission of international crimes in Darfur by recruiting, arming, providing financial support to or otherwise aiding and abetting the Janjaweed in the commission of crimes against humanity, including the murder of civilians, forced displacement and rape, and war crimes, including indiscriminate attacks on civilians, destruction of civilian objects and looting. The Commission notes that a pattern of looting and rape by the Janjaweed has clearly emerged during the conflict in Darfur, a fact which could not have been ignored by those identified by the Commission. By continuing their actions nonetheless, they are suspected of having aided and abetted the Janjaweed in looting and raping.

D. Planning international crimes

551. Planning consists of devising, agreeing upon with others, preparing and arranging for the commission of a crime. Under international case law, planning implies that one or several persons contemplate designing the commission of a crime at both the preparatory and executory phases.[188]

552. It is apparent from the exposition of violations set out in part one of the present report that serious violations of human rights and humanitarian law were perpetrated on a large scale by Government forces or militias under Government control. Such violations as deliberate attacks on civilians, indiscriminate attacks on civilians and civilian objects or attacks on villages hiding or sheltering rebels, which caused disproportionate harm to civilians, or mass executions, as well as forced displacement of civilians from their homes, were widespread and systematic and amounted to crimes against humanity. In addition, they occurred repeatedly and so frequently that they made up a systematic pattern of criminal conduct. In other words, the attacks manifestly resulted from a centrally planned and organized policy.

553. Thus, it can safely be said that the magnitude and scale of some crimes against humanity (indiscriminate attacks on civilians and the forced transfer of civilians), as

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[188] See the rulings of a Trial Chamber of the International Criminal Tribunal for Rwanda in *Akayesu* (para. 480) and Trial Chambers of the International Tribunal for the Former Yugoslavia in *Blaškić* (at para. 279) and *Kordić and Čerkez* (at para. 386).

well as their consistency over a long period of time (February 2003 to the present), necessarily imply that those crimes have resulted from a central planning operation.

554. Against this background, the Commission has found reliable material that tends to show that two high-level local officials in Darfur have been involved in the planning of crimes against humanity and large-scale war crimes in Darfur, including indiscriminate attacks on civilians, the destruction of civilian objects and the murder of civilians.

E. Ordering international crimes

555. Under international case law, the order to commit an international crime need not be given in writing or in any particular form. Furthermore, the existence of an order may be proved though circumstantial evidence.[189] Ordering implies, however, a superior-subordinate relationship between the person giving the order and the one executing it. The superior must be in a position where he or she possesses the authority to give orders.[190]

1. Government of the Sudan

556. The Commission has gathered reliable material and information which tend to show that, by reason of their official position in the chain of command or according to eyewitnesses in the battlefield, two members of the central Government of the Sudan and two members of the military operating in Darfur can be suspected of having ordered the commission of crimes against humanity and large-scale war crimes in Darfur, including indiscriminate attacks on civilians, destruction of civilian objects and forced displacement.

2. Janjaweed

557. The Commission has collected reliable information which allows it to point to two members of the Janjaweed who directly ordered the men under their control to execute civilians. They are suspected of having ordered the murder of civilians, a crime against humanity.

F. Failing to prevent or repress the perpetration of international crimes (superior responsibility)

558. In international law, persons who hold positions of command may be held criminally responsible if they knowingly fail to prevent or suppress international crimes committed by their subordinates. Command responsibility is a well-established principle of international law that reflects the hierarchical structure of disciplined forces.[191] This responsibility for omission, set out in a number of national and international cases,[192] arises under the following cumulative

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[189] See *Blaškić*, Trial Chamber, para. 281.

[190] See *Kordić and Čerkez*, Trial Chamber, para. 380, confirmed by the Appeals Chamber, 17 December 2004, para. 28.

[191] See 72 *British Yearbook of International Law* 2001, at para. 699.

[192] They start with *Yamashita*, brought before the United States Supreme Court in 1946 (judgement of 4 February 1946, 327 US 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946)) and upheld in some cases

conditions: (a) the person exercises effective command, control or authority over the perpetrators; it is not necessary for a formal hierarchical structure to exist, for a de facto position of authority or control may suffice; in addition, the superior may be either a military commander or a politician or civilian leader; moreover, the authority or control need not be exercised directly over the perpetrators of the crimes, but may be wielded through the chain of command; (b) the superior knew or should have known, or had information which should have enabled him to conclude in the circumstances prevailing at the time, that crimes were being or had been committed and consciously disregarded such information or knowledge; (c) the superior failed to take the action necessary to prevent or suppress the crimes; in particular, he failed to take all the measures necessary to prevent the perpetration of the crimes, failed to stop the crimes while they were being committed, failed to report to the relevant authorities that his subordinates had engaged in criminal conduct or failed to order the punishment of the perpetrators if such punishment fell within his remit.

559. Depending on the circumstances of each case, the subjective element required by international law is knowledge (i.e., awareness that crimes are being committed or are about to be committed) and intent (the desire or will not to take action) or at least recklessness (awareness that failure to prevent the action of subordinates risks bringing about certain harmful consequences and nonetheless ignoring such risk). Instead, when the superior should have known that crimes were being committed or had been committed, culpable negligence seems to be sufficient. Finally, when the superior knows that crimes were being committed and fails to act to repress them, what is required, in addition to knowledge, is intent not to take action (or at least culpable negligence).

560. It is necessary to add that the notion of superior responsibility also applies to internal armed conflicts, as has been authoritatively held by the International Tribunals.[193] The legal opinion of States is to the same effect.[194]

561. With regard to the position of rebels, it would be groundless to argue (as some rebel leaders did when questioned by the Commission) that the two groups of

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brought before the United States court sitting in Nuremberg (see *US v. Pohl and others*, judgement of 3 November 1947, in *Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10* (Washington, D.C.: United States Government Printing Office, 1950, vol. V at 1011 and 1055); *US v. von List and others*, judgement of 19 February 1948 (ibid., vol. XI, at 512-515, 1230, 1244, 1256-1271, 1299, 1303); *US v. von Leeb and others*, judgement of 28 October 1948 (ibid., vol. XI, at 510-550, 631), *US v. von Weizsäcker*, judgement of 12 December 1949 (ibid., vol. XIV, at 487, 517, 671), as well as in *Delalić and others* (paras. 354-8), in *Blaškić* (paras. 295-303) in *Kordić and Čerkez* (paras. 405-17).

[193] See the rulings by a Trial Chamber of the International Tribunal for the Former Yugoslavia in *Hadzihasanović and others* (*Decision on joint challenge to jurisdiction*, 12 November 2002, paras. 9-179) and by the Appeals Chamber in the same case (*Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility*, 16 July 2003, at paras. 11-36).

[194] For instance, in a memorandum of 21 January 2000, the Canadian Foreign Department's Legal Bureau, after stating that articles 25 and 28 of the Rome Statute (respectively on responsibility for ordering, soliciting, etc. crimes and responsibility of commanders or superiors) "codify international customary law with respect to criminal responsibility" (in 38 *Canadian Yearbook of International Law* 2000, at 336), the legal Bureau goes on to note that "In internal armed conflicts, a non-state leader could also be convicted of war crimes, if the prosecutor proved that the leader was part of an 'organized armed group.' " (ibid., at 337).

insurgents (SLA and JEM) were not tightly organized militarily, with the consequence that often military engagements conducted in the field had not been planned, directed or approved by the military leadership. Even assuming that this was true, commanders must nevertheless be held accountable for actions of their subordinates. The notion is widely accepted in international humanitarian law that each army, militia or military unit engaging in fighting, in either an international or internal armed conflict, must have a commander charged with maintaining discipline and ensuring compliance with the law. This notion is crucial to the very existence, as well as the enforcement of the whole body, of international humanitarian law, because without a chain of command and a person in control of military units, anarchy and chaos would ensue and no one could ensure respect for law and order.

562. There is another and more specific reason why the political and military leadership of SLA and JEM cannot refuse to accept accountability for any crime committed by their troops in the field if such leadership refrained from preventing or suppressing those crimes. This reason resides in the signing by that leadership of various agreements with the Government of the Sudan. By entering into those agreements on behalf of their respective "movements", the leaders of each movement assumed full responsibility for the conduct or misconduct of their combatants. More specifically, in the Protocol on the Establishment of Humanitarian Assistance in Darfur, of 8 April 2004, the rebels undertook to respect the general principles of international humanitarian law, and those principles no doubt included that of superior responsibility.

1. Government of the Sudan

563. The Commission has gathered reliable information which allows it to identify eight senior central Government officials and military commanders and six local government officials or members of the armed forces operating in Darfur who may be suspected of being responsible for knowingly failing to prevent or suppress the perpetration of crimes, that is, for superior responsibility. A consistent body of credible material collected by the Commission suggests that those officials were cognizant of the situation in Darfur and of the large-scale perpetration of violations of international human rights law and international humanitarian law in the region from their own sources and from other sources or, at the very least, should have known what was happening in Darfur but failed to take any action to stop the atrocities from being perpetrated. Furthermore, they failed to punish those under their control who committed serious crimes. Depending on the circumstances of each case, they may be suspected of bearing superior responsibility for the crimes committed by the men under their effective control, which include the crimes against humanity of the murder of civilians and forced displacement and the war crimes of carrying out indiscriminate attacks on civilians, the destruction of civilian objects, looting and torture.

2. Rebels

564. In keeping with the comment made above concerning the structure of the rebel groups, the Commission has gathered sufficient reliable material to point to four individuals holding positions of importance within the different rebel groups who may be suspected of being responsible for knowingly failing to prevent or suppress the perpetration of crimes by rebels. There is information that given that they had

effective overall control over military personnel fighting for the rebel groups, they were aware of some crimes committed by such military personnel or, at the very least, they should have known what was happening but failed to take any action to stop the atrocities from being perpetrated. Furthermore, they failed to punish those under their control who committed serious crimes. Those individuals may thus be suspected of being responsible, under the doctrine of superior responsibility, for war crimes committed by the rebels under their authority, namely, the murder of civilians, the destruction of civilian objects, forced disappearances and looting.

Part Four
Possible mechanisms to ensure accountability for the crimes committed in Darfur

I. Inadequacies of the Sudanese criminal justice system and the consequent need to propose other criminal mechanisms

565. *The need to do justice.* The magnitude and serious nature of the crimes committed against the civilian population in Darfur, by both Government forces and the Janjaweed on the one hand and by the rebels on the other, demand immediate action by the international community to end the atrocities. The perpetrators of these crimes must be brought to justice. At the same time, measures to bring relief and redress to the victims must be initiated to complete the process of accountability.

566. It is notable that not only the Security Council, in its resolutions 1556 (2004) and 1564 (2004), emphasized the urgent need for justice, but also the very parties to the conflict in Darfur insisted on the principle of accountability. Thus, in the Protocol on the Improvement of the Humanitarian Situation in Darfur, of 9 November 2004, the parties stressed the need to restore and uphold the rule of law, including investigating all cases of human rights violations and bringing to justice those responsible, in line with the expressed commitment of the African Union to fight impunity. Moreover, the parties to the conflict committed themselves to ensuring that all forces and individuals involved or reported to be involved in violations of the rights of the internally displaced persons, vulnerable groups and other civilians would be transparently investigated and held accountable to the appropriate authorities. The question arises, however, as to whether these are meaningless commitments having only cosmetic value.

567. *The inaction of both the Sudanese authorities and the rebels.* The failure of both the Government and the rebels to prosecute and try those allegedly responsible for the far too numerous crimes committed in Darfur is conspicuous and unacceptable. As pointed out above, the Government has taken some steps, which, however, constitute more of a window-dressing operation than a real and effective response to large-scale criminality linked to the armed conflict. The rebels have failed to take any investigative or punitive action whatsoever.

568. The normal and ideal response to atrocities is to bring the alleged perpetrators to justice in the courts of the State where the crimes were perpetrated or of the State of nationality of the alleged perpetrators. There may indeed be instances where a domestic system operates in an effective manner and is able to deal appropriately with atrocities committed within its jurisdiction. However, the very nature of most international crimes implies, as a general rule, that they are committed by or with the complicity of State officials; often their prosecution is therefore better left to other mechanisms. Considering the nature of the crimes committed in Darfur and the shortcomings of the Sudanese criminal justice system, which have led to effective impunity for the alleged perpetrators, the Commission is of the opinion that the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders. Other mechanisms are needed in order to do justice.

569. The Commission is of the view that two measures should be taken by the Security Council to ensure that justice is done for the crimes committed in Darfur,

keeping in mind that any justice mechanism must adhere to certain recognized principles: it must be impartial, independent and fair. With regard to the judicial accountability mechanism, the Commission recommends that the Security Council refer the situation of Darfur to the International Criminal Court. As stated above, the Sudanese judicial system has proved incapable of ensuring accountability for the crimes committed in Darfur and the authorities are unwilling to do so. The international community cannot stand idly by while human life and human dignity are attacked daily and on so large a scale in Darfur. The international community must take upon itself the responsibility to protect the civilians of Darfur and end the rampant impunity currently prevailing there.

570. The other measure is designed to provide compensation for the victims of so many gross violations of human rights, most of them amounting to international crimes. It is therefore proposed that a compensation commission be established by the Security Council.

II. Measures to be taken by the Security Council

A. Referral to the International Criminal Court

1. Justification for suggesting the involvement of the Court

571. The International Criminal Court is the first international permanent court capable of trying individuals accused of serious violations of international humanitarian law and human rights law, namely war crimes, crimes against humanity and genocide. The treaty that established the Court, the Rome Statute,[195] entered into force on 1 July 2002.

572. The Commission is of the view that resorting to the International Criminal Court would have at least six major merits. First, the Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under article 13 (b) of the Statute. The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute, to peace and stability in Darfur by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus is difficult or even impossible, resort to the Court, the only truly international institution of criminal justice, would ensure that justice is done. The fact that trial proceedings would be conducted in The Hague, the seat of the Court far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the Court, backed up by that of the Security Council, might compel both leading personalities in the Sudanese Government and the heads of rebel groups to submit to investigation and possibly criminal

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[195] *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998*, vol. I: *Final documents* (United Nations publication, Sales No. E.02.I.5), sect. A. Accessible at: http://www.un.org/law/icc/statute/romefra.htm.

proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the organ best suited for ensuring a veritably fair trial of those indicted by the Court's Prosecutor. Fifth, the Court could be activated immediately, without any delay (which would be the case if ad hoc tribunals or so-called mixed or internationalized courts were to be established). Sixth, the institution of criminal proceedings before the Court, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community.[196]

2. Inadvisability of other mechanisms

573. The Commission considers that the International Criminal Court is the only credible way of bringing alleged perpetrators to justice. It strongly advises against other measures.

(a) Inadvisability of setting up an ad hoc international criminal tribunal

574. Given that international action is urgently needed, one might consider it opportune to establish an ad hoc international criminal tribunal, as was done in the case of previous armed conflicts, such as those in the former Yugoslavia and in Rwanda, when the International Criminal Court did not yet exist. However, at least two considerations militate against such a solution. First, those Tribunals, however meritorious, are very expensive. Second, at least so far, on a number of grounds they have been rather slow in prosecuting and punishing the persons indicted. Primarily for those reasons, it would appear that at present no political will exists in the international community to set up yet another ad hoc international criminal tribunal (another major reason being that a permanent and fully fledged international criminal institution is now available).

(b) Inadvisability of expanding the mandate of one of the existing ad hoc criminal tribunals

575. The same reasons hold true against the possible expansion, by the Security Council, of the mandate of the International Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda to include jurisdiction over crimes committed in Darfur. First, such expansion would be time-consuming. It would require, after a decision of the Security Council, the election of new judges and new prosecutors as well as the appointment of Registry staff. Indeed, at present the Tribunals are overstretched, for they are working very hard to implement the completion strategy elaborated and approved by the Council. Consequently any new task for either Tribunal would require new personnel at all levels. In addition, the allocation of new tasks and the election or appointment of new staff would obviously require new financing. Thus, the second disadvantage of this option is

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[196] Under article 115 of the Rome Statute, "The expenses of the Court ... shall be provided by the following sources: (a) assessed contributions made by States parties; (b) funds provided by the United Nations, subject to the approval of the General Assembly, *in particular in relation to the expenses incurred due to referrals by the Security Council*" (emphasis added). Thus, a referral by the Security Council may entail some expenses for the United Nations, chiefly for financing investigations. Nevertheless, no financial burden will be borne by the United Nations for the most expensive part of the functioning of International Tribunals, namely the establishment of the court, the payment for the seat of the court and payment of judges, the Prosecutor's office and the Registry staff.

that it would be very expensive. It should be added that conferring a new mandate on one of the existing Tribunals would have a third drawback: such expansion could end up creating great confusion in the Tribunal, which all of a sudden would have to redesign its priorities and reconvert its tasks so as to accommodate the new functions.

(c) Inadvisability of establishing mixed courts

576. Where, as in the Sudan, States are faced with emergency situations involving the commission of large-scale atrocities, an option may be to not resort to national or international criminal courts, but rather to establish courts that are mixed in their composition, that is, consisting of both international judges and prosecutors and judges and prosecutors having the nationality of the State in which the trials are held.

577. The mixed courts established in other conflicts have followed two similar but distinct models. First, the mixed courts can be organs of the relevant State, being part of its judiciary, as in Kosovo, Timor-Leste, Bosnia and Herzegovina and Cambodia. Alternatively, the courts may be international in nature, that is, free-standing tribunals not part of the national judiciary, as in Sierra Leone. The latter, for instance, is an international criminal court, but some of its judges and other officials are nationals of Sierra Leone, giving it a hybrid character which makes it different from other international criminal courts, such as the International Criminal Court, the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. It also differs from those courts in that it is located in the country where the crimes occurred and it is funded by voluntary contributions (not assessed contributions from the United Nations budget or, as is the case of the International Criminal Court, by the States parties to the Rome Statute).

578. One obvious drawback for the creation of a special court for the crimes committed in Darfur is its financial implications. The special court for Sierra Leone, with its voluntary contributions, is hardly coping with the demands of justice there. A second major drawback is the time-consuming process required for establishing the courts by means of an agreement with the United Nations. The International Criminal Court offers the net advantage, as noted above, of imposing no significant financial burden on the international community and being available immediately.

579. Third, the investigation and prosecution would relate to persons enjoying authority and prestige in the country and wielding control over the State apparatus. The establishment of a special court by agreement between the actual Government and the United Nations for the investigation and prosecution of members of that very Government seems unlikely. Moreover, the situation of the national judges who would sit on courts dealing with crimes that may have been committed by leaders would not only be uncomfortable, but also unbearable and dangerous.

580. Fourth, many Sudanese laws are grossly incompatible with international norms. The establishment of mixed courts that may be able to rely on the national legal system would give rise to serious problems, particularly with regard to the 1991 Sudanese criminal procedural law. In contrast, the International Criminal Court constitutes a self-contained regime with a set of detailed rules on both substantive and procedural law that are fully attuned to respect for the fundamental human rights of all those involved in criminal proceedings before the Court.

581. Furthermore, and importantly, the situation of the Sudan is distinguishable in at least one respect from most situations in which a special court has been created in the past. The impugned crimes are within the jurisdiction *rationae temporis* of the International Criminal Court, as the crimes discussed in the present report were committed after 1 July 2002.[197]

582. Based on all of the comments set out above, the Commission strongly holds the view that resort to the International Criminal Court, the only truly international criminal institution, is the single best mechanism to allow justice to be done for the crimes committed in Darfur.

3. Modalities of activation of the jurisdiction of the Court

583. The Sudan signed the Rome Statute on 8 September 2000 but has not yet ratified it and is thus not a State party.[198] The prosecution of nationals of a State that is not party to the Rome Statute is possible under limited circumstances. First, it is possible if the crime occurred on the territory of a State party (Rome Statute, article 12 (2) (a)). This provision is obviously not applicable in this case since the crimes occurred in the Sudan and were allegedly committed by Sudanese nationals.[199] Second, the Court's jurisdiction can be triggered by a referral to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations (Rome Statute, article 13 (b)). Finally, the Sudan may, by means of a declaration lodged with the Court's Registrar, accept the exercise of jurisdiction by the Court with respect to the crimes in question (Rome Statute, article 12 (3)).

584. The Commission strongly recommends that the Security Council immediately refer to the International Criminal Court the situation of Darfur and the crimes perpetrated there since the beginning of the internal armed conflict. The referral would be fully warranted, for the situation of Darfur indisputably constitutes a threat to the peace, as the Security Council determined in its resolutions 1556 (2004) and 1564 (2004). The prosecution by the International Criminal Court of persons allegedly responsible for the most serious crimes in Darfur would no doubt contribute to the restoration of peace in that region. Recourse to the Court would have the numerous major merits emphasized above.

585. There is little doubt that the alleged crimes that have been documented in Darfur meet the thresholds of the Rome Statute as defined in articles 7 (1), 8 (1) and 8 (2) (f). As was stated earlier, there is a protracted armed conflict, not of an international nature, in Darfur between the governmental authorities and organized armed groups. As the factual findings demonstrate, a body of reliable information indicates that war crimes may have been committed on a large scale, at times even as part of a plan or a policy. There is also a wealth of credible material suggesting

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[197] See Rome Statute, article 11.

[198] See official web site of the International Criminal Court: http://www.icc-cpi.int/statesparties.html#S, retrieved on 2 November 2004, updated as at 27 September 2004.

[199] If crimes under the jurisdiction of the International Criminal Court were proved to have been committed in Chad or by Chadian nationals, the situation would remain the same so far as the Court's jurisdiction is concerned: Chad signed the Rome Statute on 20 October 1999 but has not yet ratified it. See web site of the International Criminal Court: http://www.icc-cpi.int/statesparties.html#S, retrieved on 2 November 2004, updated as at 27 September 2004.

that criminal acts consisting of widespread or systematic attacks directed against the civilian population were committed with knowledge. These may amount to crimes against humanity.

586. The Sudanese justice system is unable and unwilling to address the situation in Darfur. That system has been significantly weakened during the past decade. Restrictive laws granting broad powers to the executive have particularly undermined the effectiveness of the judiciary. In fact, many of the laws in force in the Sudan today contravene basic human rights standards. The Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of such acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. In any event, many feared reprisals if they resorted to the national justice system.

587. The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective. As stated elsewhere in the present report, very few victims have lodged official complaints regarding crimes committed against them or their families owing to a lack of confidence in the justice system. In the few instances in which complaints were made, most of the cases were not properly pursued. Further procedural hurdles limited the victims' access to justice, such as the requirement of a medical examination for victims of rape. A Ministry of Justice decree relaxing this requirement for the registration of rape complaints is not known to most law enforcement agencies in Darfur. The rape commissions established by the Ministry of Justice have been ineffective in investigating this crime. The Ministry of Defence established one committee to compensate the victims of three incidents of mistaken bombing in Habila, Umm Gozin and Tulo. While the report of the National Commission of Inquiry established by the President acknowledged some wrongdoing on the part of the Government, most of the report is devoted to justifying and rationalizing the actions taken by the Government in relation to the conflict. The reality is that, despite the magnitude of the crisis and its immense impact on civilians in Darfur, the Government informed the Commission of very few cases of individuals who had been prosecuted or even simply disciplined in the context of the current crisis.

588. Referring the situation in Darfur to the International Criminal Court in a resolution adopted under Chapter VII of the Charter of the United Nations would have a mandatory effect. In that way, the Government of Sudan could not deny the Court's jurisdiction under any circumstances. The Commission recommends that the resolution empower the Court's prosecutor to investigate on his own initiative any individual case that is related to the current conflict in Darfur. As for the temporal scope of the investigations, the Commission suggests that the resolution should not limit the investigations to a specific time frame. As is clear from the present report, while there was an escalation in the attacks after February 2003, the Commission received information regarding events that took place in 2002 and even earlier. Pursuant to article 11 of its Statute, the Court has temporal jurisdiction as from 1 July 2002, so the Prosecutor could investigate any crimes committed after that date.

589. In the opinion of the Commission, it would be fully appropriate for the Security Council to submit the situation of Darfur to the International Criminal Court. The Council has repeatedly emphasized, in its resolutions 1556 (2004) and 1564 (2004), that the Government of the Sudan has committed serious violations of human rights against its own nationals and that serious breaches of human rights are also being committed by the rebels. Not only individual States, but the whole world community through its most important political organ, should energetically react to this consistent pattern of large-scale violations of human rights. Moreover, the Security Council stressed in its aforementioned resolutions the need to put a stop to impunity in Darfur, for the end of such impunity would contribute to restoring security in the region, thereby allowing the hundreds of thousands of internally displaced persons to return to their homes or to any other place of their choosing. It would thus be consistent for the Council, the highest body of the international community responsible for maintaining peace and security, to refer the situation of Darfur and the crimes perpetrated there to the highest criminal judicial institution of the world community.

B. Establishment of a compensation commission

590. For the reasons set out below, the Commission also proposes to the Security Council the establishment of a compensation commission, not as an alternative, but rather as a measure complementary to the referral of the situation to the International Criminal Court. States have the obligation to act not only against perpetrators, but also on behalf of victims. While a compensation commission does not constitute a mechanism for ensuring that those responsible are held accountable, its establishment would be vital to redressing the rights of the victims of serious violations committed in Darfur.

1. Justification for suggesting the establishment of a compensation commission

591. Given the magnitude of the damage to civilian populations caused by the armed conflict, it is necessary to envisage granting reparations to victims of crimes committed during such conflict, whether or not the perpetrators of international crimes have been identified.

592. This proposal is based on practical and moral, as well as legal, grounds. As for the former, suffice it to mention that in numerous instances, particularly in rape cases, it will be very difficult for any judicial mechanism to establish who perpetrated the crimes. In other words, judicial findings and retribution by a court of law may prove to be very difficult or even impossible. In such cases it would be necessary at least to make good the material and moral damage caused to the victims. Although the perpetrators will in fact continue to enjoy impunity, the international community may not turn a blind eye to the plight of the victims. It should as a minimum attenuate their suffering by obliging the Sudanese State to make reparation for their harm.

593. Serious violations of international humanitarian law and human rights law can entail not only the individual criminal liability of the perpetrator but also the international responsibility of the State (or state-like entity) on whose behalf the

perpetrator was acting. This international responsibility involves the State (or the state-like entity) paying compensation to the victim.[200]

594. At the time this international obligation was first established, and perhaps even in 1949 when the Geneva Conventions were drafted and approved, it was clearly conceived of as an obligation of each contracting State towards any other contracting State concerned. In other words, it was seen as an obligation between States, with the consequence that (a) each relevant State was entitled to request reparations or compensation from the other State concerned, and (b) the nationals of that State could concretely be granted compensation for any damage suffered only by lodging claims with national courts or other organs of the State. National case law in some countries[201] has held that the obligation was not intended directly to grant rights to individual victims of war crimes or grave breaches of the Geneva Conventions. In addition, the international obligation was to be considered as having been fulfilled any time, following the conclusion of a peace treaty, the responsible State had agreed to pay to the other State or States war reparations or compensation for damages caused to the nationals of the adversary, regardless of whether actual payment was ever made.

595. The emergence of human rights doctrines in the international community and the proclamation of human rights at the international and national levels since the adoption of the United Nations Charter in 1945 have had a significant impact on this area as well. In particular, the right to an effective remedy for any serious violation of human rights has been enshrined in many international treaties.[202] Furthermore, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of

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[200] The international obligation to pay compensation was first laid down in article 3 of the 1907 Hague Convention on Land Warfare, whereby "A belligerent party which violates the provisions of the said regulations [the regulations annexed to the Convention, also called Hague Regulations] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces". This obligation was restated, with regard to grave breaches of the 1949 Geneva Conventions, in each Convention, where it was provided that "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding article [on grave breaches]" (common Article on grave breaches, found respectively at 51/52 /131/148). The same obligation, although worded in the terms of article 3 of the 1907 Hague Convention, was laid down in article 91 of Additional Protocol I.

[201] See the Japanese cases mentioned by Shin Hae Bong, "Compensation for Victims of Wartime Atrocities – Recent Developments in Japan's Case Law", in 3 *Journal of International Criminal Justice* (2005), at 187-206. See also the German cases referred to in A. Gattini, *Le Riparazioni di Guerra nel Diritto Internazionale* (Padova: Cedam, 2003), 249 ff. However, on 11 March 2004 the Italian Court of Cassation delivered in *Ferrini* an elaborate judgement in which the Court, based among other things on *jus cogens*, held that an Italian deported to Germany for slave labour in 1944 was entitled to compensation for this war crime because the international norms on compensation, given their peremptory nature, overrode the customary rules on foreign State immunity (text in Italian in 87 *Rivista di diritto internazionale* (2004), 540-551).

[202] See article 2 (3) of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the 1984 Convention against Torture, article 39 of the 1989 Convention on the Rights of the Child, as well as articles 19 (3) and 68 (3) of the Statute of the International Criminal Court. See also article 8 of the 1948 Universal Declaration of Human Rights.

Power, adopted by the General Assembly in 1985, provides that States should develop and make readily available appropriate rights and remedies for victims.[203]

596. The right to an effective remedy also involves the right to reparations (including compensation) if the relevant judicial body satisfies itself that a violation of human rights has been committed; indeed, almost all the provisions cited above mention the right to reparations as the logical corollary of the right to an effective remedy.

597. As the then President of the International Tribunal for the Former Yugoslavia, Judge Claude Jorda, rightly emphasized in his letter dated 12 October 2000 addressed to the Secretary-General,[204] the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on State responsibility for war crimes and other international crimes. Those provisions may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other contracting States, but also vis-à-vis the victims, that is, the individuals who suffered from the crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparations (including compensation) for damage resulting from those abuses.

598. In the light of the above comments and on the basis of the aforementioned body of law on human rights, the proposition is warranted that, at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as de jure or de facto organs, to make reparations (including compensation) for the damage done.

599. Depending on the specific circumstances of each case, reparations may take the form of *restitutio in integrum* (restitution of the assets pillaged or stolen), monetary compensation, rehabilitation, including medical and psychological care as well as legal and social services, satisfaction, including a public apology with acknowledgement of the facts and acceptance of responsibility or guarantees of non-

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[203] Article 21 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted on 29 November 1985 by the General Assembly (resolution 40/34). See also the "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law" which are currently under consideration by the Commission on Human Rights upon proposals by T. van Boven and C. Bassiouni.

[204] "[T]he emergence of human rights under international law has altered the traditional State responsibility concept, which focused on the State as the medium of compensation. The integration of human rights into State responsibility has removed the procedural limitation that victims of war could seek compensation only through their own Governments, and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility. Moreover, there is a clear trend in international law to recognize a right to compensation in the victim to recover from the individual who caused his or her injury. This right is recognized in the Victims Declaration [adopted by the General Assembly in its resolution 40/34], the Basic Principles, other international human rights instruments and, most specifically, in the Rome Statute, which is indicative of the state of the law at present" (in S/2000/1063, appendix para. 20).

repetition.[205] As rightly stressed by the Secretary-General in 2004, it would also be important to combine various mechanisms or forms of reparation.[206]

600. It is in the light of this international legal regulation that the obligation of the Sudan to pay compensation for all the crimes perpetrated in Darfur by its agents and officials or de facto organs must be seen. A similar obligation is incumbent upon rebels for all crimes they may have committed, whether or not the perpetrators are identified and punished.

2. Establishment of a compensation commission

601. It is therefore proposed that an international compensation commission be established, consisting of 15 members, 10 appointed by the Secretary-General and 5 appointed by an independent Sudanese body. The commission, to be chaired by an international member, should be composed of persons with an established international reputation, some specializing in law (in particular international law, torts or commercial law), others in accounting, loss adjustment and environmental damage. The commission should be split into five chambers, each consisting of three members; it should sit in Darfur and have a three year mandate. Four chambers should deal with compensation for any international crime perpetrated in Darfur. A special fifth chamber should deal specifically with compensation for victims of rape. Such chamber is necessary considering the widespread nature of this crime in Darfur and the different nature of the damage suffered by the victims. Compensation also takes on a special meaning here considering that, for rape in particular, as stated above it is very difficult to find the actual perpetrators. Many victims will not benefit from seeing their aggressor held accountable by a court of law. Hence, a special scheme may be advisable to ensure compensation (or, more generally, reparation) for the particularly inhumane consequences suffered by the numerous women raped in Darfur.

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[205] The various forms of compensation and their respective advantages were aptly set out by the Secretary-General in his report to the Security Council of 23 August 2004 on the rule of law and transitional justice in conflict and post-conflict societies. There the Secretary-General stated the following: "reparations sometimes include non-monetary elements, such as restitution of victims' legal rights, programmes of rehabilitation for victims and symbolic measures, such as official apologies, monuments and commemorative ceremonies. The restoration of property rights, or just compensation where this cannot be done, is another common aspect of reparations in post-conflict countries. Material forms of reparation present perhaps the greatest challenges, especially when administered through mass government programmes. Difficult questions include who is included among the victims to be compensated, how much compensation is to be rewarded, what kinds of harm are to be covered, how harm is to be quantified, how different kinds of harm are to be compared and compensated and how compensation is to be distributed" (S/2004/616, para. 54).

[206] "No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions. Whatever mode of transitional justice is adopted and however reparations programmes are conceived to accompany them, both the demands of justice and the dictates of peace require that something be done to compensate victims. Indeed, the judges of the tribunals for Yugoslavia and Rwanda have themselves recognized this and have suggested that the United Nations consider creating a special mechanism for reparations that would function alongside the tribunals." (ibid., para. 55).

602. The commission should pronounce upon claims to compensation made by all victims of crimes, that is (under the terms of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in its resolution 40/34 of 29 November 1985), persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights as a result of international crimes in Darfur, committed by either Government authorities or any de facto organ acting on their behalf or by rebels, whether or not the perpetrator has been identified and brought to trial.

603. Funding for payment of compensation to victims of crimes committed by Government forces or de facto agents of the Government should be provided by the Sudanese authorities, which should be requested by the Security Council to place the necessary sum into an escrow account. Funding for compensation of victims of crimes committed by rebels (whether or not the perpetrators have been identified and brought to trial) should be afforded through a trust fund to be established on the basis of international voluntary contributions.

III. Measures that could be taken by other bodies

604. While referral to the International Criminal Court is the main immediate measure to be taken to ensure accountability, the Commission wishes to highlight some other available measures, which are not suggested as possible substitutes for the referral of the situation of Darfur to the Court.

A. Possible role of national courts of States other than the Sudan

605. Courts of States other than the Sudan may play an important role in bringing to justice persons suspected or accused of having committed international crimes in Darfur. In this respect, however, the question arises of whether and to what extent that would be compatible with the activation of the International Criminal Court. It is therefore fitting briefly to discuss the issue of the respective roles of national courts and the International Criminal Court in cases where a situation has been referred by the Security Council to the Court.

1. Referral by the Security Council and the principle of complementarity

606. The question to be addressed is that of whether the principle of complementarity on which the International Criminal Court is based, that is, the principle whereby the Court steps in only when the competent national courts prove to be unable or unwilling genuinely to try persons accused of serious international crimes falling under the Court's jurisdiction, should apply in the case under discussion. In other words, the question arises whether, when the Security Council refers a situation to the Court under article 13 (b) of the Rome Statute, the Court must apply the principle of complementarity and therefore first see whether there is any competent national court willing and able to prosecute the crimes emerging in the situation.

607. The Commission notes that, while it is true that under article 18 (1) of the Statute of the Court the Prosecutor is bound to notify all States parties that a State

has referred to him a situation or that he has decided to initiate investigations *proprio motu*, no such duty of notification to States parties exists with regard to referrals by the Security Council. However, from these rules on notifications it does not follow that complementarity becomes inapplicable in the case of Security Council referrals. Indeed, it would seem that the fact that the Prosecutor is not obliged to notify States parties of a Security Council referral is justified by the fact that in such a case all States are presumed to know of the referral, given that acts of that body are public and widely known. This is further evidenced by the fact that the Council is the supreme body of the Organization and all members of the United Nations are bound by its decisions pursuant to Article 25 of the Charter. In contrast, without the Prosecutor's notification it would be hard for States immediately to become cognizant of his decision to initiate an investigation *proprio motu* or following the referral by a State. Complementarity therefore also applies to referrals by the Security Council.

608. However, a referral by the Security Council is normally based on the assumption that the territorial State is not administering justice because it is unwilling or unable to do so.[207] Therefore, the principle of complementarity will not usually be invoked *in casu* with regard to that State.

609. The Commission's recommendation for a Security Council referral to the International Criminal Court is based on the correct assumption that Sudanese courts are unwilling and unable to prosecute the numerous international crimes perpetrated in Darfur since 2003. The Commission acknowledges that the final decision in this regard lies, however, with the Prosecutor of the Court.

2. The notion of universal jurisdiction

610. The Commission wishes to emphasize that the triggering of the jurisdiction of the International Criminal Court by the Security Council should be done without prejudice to the role that the national criminal courts of other States can play. Indeed, other States might exercise so-called universal jurisdiction over crimes allegedly committed in Darfur. The Commission sees the exercise of universal jurisdiction, subject to the conditions set out below, as a complementary means of ensuring accountability for the crimes committed in Darfur, which could indeed help to alleviate the burden of the International Criminal Court.

611. The traditional way to bring to trial alleged perpetrators of international crimes is for States to rely on one of two unquestionable principles: territoriality (i.e., the crime has been committed on the State's territory) and active nationality (i.e., the crime has been committed abroad but the perpetrator is a national of the prosecuting State). In addition, extraterritorial jurisdiction over international crimes committed by non-nationals has been exercised and is generally accepted on the basis of passive personality (i.e., the victim is a national of the prosecuting State).

612. In the absence of any of these accepted jurisdictional links at the time of the commission of the offence, the principle of universality empowers any State to bring to trial persons accused of international crimes, regardless of the place of commission of the crime or the nationality of the perpetrator or the victim. The principle is justified by the notion that international crimes constitute attacks on the

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[207] The Commission acknowledges, however, that the final decision in this regard remains that of the Prosecutor of the International Criminal Court.

whole international community and infringe on values shared by all members of that community.

613. It seems indisputable that a general rule of international law exists authorizing States to assert universal jurisdiction over war crimes, as well as crimes against humanity and genocide. The existence of this rule is proved by the convergence of States' pronouncements and national pieces of legislation,[208] as well as by case law.[209]

614. However, the customary rules in question, construed in the light of general principles currently prevailing in the international community, arguably make the exercise of universal jurisdiction subject to two major conditions. First, the person suspected or accused of an international crime must be present on the territory of the prosecuting State. Second, before initiating criminal proceedings that State should determine whether the territorial State (i.e., the State where the crime has allegedly been perpetrated) or the State of active nationality (i.e., the State of which the person suspected or indicted is a national) is willing to institute proceedings against that person and hence is prepared to request his or her extradition. Only if the State or States in question refuse to seek extradition or are patently unable or unwilling to bring the person to justice may the State on whose territory the person is present initiate proceedings against him or her.

615. In the case of Darfur, the second condition would not need to be applied, since, as pointed out above, Sudanese courts and other judicial authorities have clearly shown that they are unable or unwilling to exercise jurisdiction over the crimes perpetrated in Darfur.

3. Exercise of universal jurisdiction and the principle of complementarity of the International Criminal Court

616. The issue of Security Council referrals and the principle of complementarity has been discussed above. The Commission takes the view that complementarity would also apply to the relations between the International Criminal Court and the national courts of countries other than the Sudan. In other words, the International Criminal Court should defer to national courts other that those of the Sudan which genuinely undertake proceedings on the basis of universal jurisdiction. While, as stated above, a referral by the Security Council will normally be based on the assumption that the territorial State is not administering justice because it is unwilling or unable to do so,[210] there is no reason to doubt a priori the ability or willingness to proceed of any other State asserting either universal jurisdiction or extraterritorial jurisdiction on any of the bases mentioned above. The principle of

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[208] See, for instance, the legislation of such countries as Spain (article 23 of the 1985 General Law on the Judiciary), Austria (article 65.1.2 of the Criminal Code), Switzerland (articles 108 and 109 of the Military Penal Code) and Germany (article 6.9 of the Criminal Code).

[209] For instance, see the decision the Spanish Constitutional Court delivered on 10 February 1997 in the *Panamian Ship* case (in *El Derecho*, CDROM, 2002, Constitutional Decisions); the decision (*auto*) the Spanish *Audiencia nacional* handed down on 4 November 1998 in *don Alfonso Francisco Scilingo* (ibid., Criminal Cases), the decisions of the same *Audencia nacional* in *Pinochet* (decision of 24 September 1999, ibid.), *Fidel Castro* (decision of 4 March 1999, ibid.), as well as the judgement of 21 February 2001 handed down by the German Supreme Court (*Bundesgerichtshof*) in *Šokolović* (3 StR 372/00).

[210] As stated above, the Commission, however, acknowledges that the final decision in this regard lies with the Prosecutor of the International Criminal Court.

complementarity, one of the mainstays of the International Criminal Court system, should therefore operate fully in cases of assertion of universal jurisdiction over a crime referred to the Court by the Security Council.

B. Truth and reconciliation commission

617. The Commission considers that a truth and reconciliation commission could play an important role in ensuring justice and accountability. Criminal courts by themselves may not be suited to reveal the broadest spectrum of crimes that took place during a period of repression, in part because they may convict only when a crime is proved beyond a reasonable doubt. In situations of mass crime, such as that occurring in Darfur, a relatively limited number of prosecutions, no matter how successful, may not completely satisfy the victims' expectations of acknowledgement of their suffering. What is important, in the Sudan, is a full disclosure of the whole range of criminality.

618. The Commission has looked at several accountability mechanisms that formed part of certain truth and reconciliation commissions. In one of them, amnesties were granted to perpetrators of serious violations of human rights and humanitarian law. Even though those amnesties were granted in exchange for public confessions by the perpetrators, they generally — and correctly in the Commission's opinion — have been considered unacceptable in international law. They have also been widely considered to be in violation of the accepted United Nations position that there should be no amnesty for genocide, war crimes or crimes against humanity. However, in the same truth and reconciliation commission (and in another one) some witnesses who were summoned under subpoena and were compelled to testify against themselves were granted "use immunity", under the terms of which they were assured that any information they disclosed to the truth and reconciliation commission would not be used against them in any criminal proceedings. Use immunity may be held to be acceptable in international law, at least under the circumstances of a truth and reconciliation commission: it contributes to the revelation of truth. Perpetrators are constrained to reveal all, albeit on the limited assurance that their testimony to the truth and reconciliation commission will not be used against them in criminal proceedings. Nevertheless, society can hold them accountable for the crimes they admit to having committed, and they may still be prosecuted, the only evidence not usable against them being that which they gave at the truth and reconciliation commission hearings.

619. In another truth and reconciliation commission, criminal and civil liability for non-serious crimes (excluding murder and rape, for example) could be extinguished, provided the perpetrators made a full disclosure of all their crimes, made apologies to their victims and agreed to do community service or pay reparations or compensation to the victims. All this happened in circumstances in which the courts oversaw the whole process. This measure is a variant of the accountability mechanisms; it ensures that as many perpetrators as possible are revealed because they come forward, but they also pay some price to society — particularly to the victims. It is not an amnesty process as such; it is not unlike a plea-bargaining arrangement between the State and the offender. The additional benefit of such an arrangement initiated by the truth and reconciliation commission is that it becomes a process in which the community, and particularly the victims, become very directly involved.

620. In many contexts, therefore, truth and reconciliation commissions have played an important role in promoting justice, uncovering truth, proposing reparations and recommending reforms of abusive institutions.

621. Whether a truth and reconciliation commission would be appropriate for the Sudan, and at what stage it should be established, is a matter that only the Sudanese people should decide through a truly participatory process. These decisions should ideally occur: (a) once the conflict is over and peace is re-established; (b) as a measure complementary to criminal prosecution, which instead should be set in motion as soon as possible, even if the conflict is still under way, with a view to having a deterrent effect, that is, stopping further violence; and (c) on the basis of an informed discussion among the broadest possible sections of Sudanese society, which takes into account international experience and, on that basis, assesses the likely contribution of a truth and reconciliation commission to the Sudan. Recent international experience indicates that such commissions are likely to have credibility and impact only when their mandates and composition are determined in the context of a broad consultative process that includes civil society and victim groups. A truth and reconciliation commission established for the purpose of substituting justice or producing a distorted truth should be avoided.

C. Strengthening the Sudanese criminal justice system

622. In the face of the rampant impunity in Darfur and in the Sudan, it is essential that the Sudanese legal and judicial system be strengthened so as to be able to render justice in a manner that is consistent with human rights law.

623. It would first be advisable for the Sudan to abolish "specialized courts", which have not proved to be efficient in the least in fighting impunity for crimes arising out of the state of emergency declared by the President. The Sudan should also consider passing legislation designed to ensure the full independence and impartiality of the judiciary and provide it with adequate powers enabling it to address human rights violations.

624. Moreover, the Sudan should consider providing training to its judges, prosecutor and investigators, to be given by international experts with appropriate experience in training. Special emphasis should be placed on human rights law, humanitarian law and international criminal law. Special legislation and training should also be envisaged to improve the independence and impartiality of the judiciary.

625. It would also be important to recommend that the Sudanese authorities repeal article 33 of the National Security Forces Act of 1999, which grants immunity from prosecution to any "member" or "collaborator" for any act connected with the official work of such persons. While the authorities have assured the Commission that immunity was automatically lifted when serious violations of international human rights or humanitarian law were committed, the Commission has not been able to verify, despite numerous formal requests, that this had indeed been the case. To the contrary, the Commission can only infer from the absence of any real prosecution of those responsible for the numerous crimes committed in Darfur that the aforementioned provision granting immunity has been, at least de facto, applied. This provision is in any case contrary to international law, at least when applied to serious violations of international human rights law and crimes against humanity. Immunities currently accruing to other public officials, such as members of the police, for human rights violations should also be abolished.

Part Five
Conclusions and recommendations

626. The people of Darfur have suffered enormously during the past few years. Their ordeal must remain at the centre of international attention. They have been living a nightmare of violence and abuse that has stripped them of the very little they had. Thousands were killed, women were raped, villages were burned, homes were destroyed and belongings were looted. About 1.8 million were forcibly displaced and became refugees or internally displaced persons. They need protection.

627. Establishing peace and ending the violence in Darfur are essential for improving the human rights situation. But real peace cannot be established without justice. The Sudanese justice system has unfortunately demonstrated that it is unable or unwilling to investigate and prosecute the alleged perpetrators of the war crimes and crimes against humanity committed in Darfur. It is absolutely essential that those perpetrators be brought to justice before a competent and credible international criminal court. It is also important that the victims of the crimes committed in Darfur be compensated.

628. The Sudan is a sovereign State and its territorial integrity must be respected. While the Commission acknowledges that the Sudan has the right to take measures to maintain or re-establish its authority and defend its territorial integrity, sovereignty entails responsibility. The Sudan is required not only to respect international law, but also to ensure its respect. It is regrettable that the Government of the Sudan has failed to protect the rights of its own people. The measures it has taken to counter the insurgency in Darfur have been in blatant violation of international law. The international community must therefore act immediately and take measures to ensure accountability. Members of rebel groups who have committed serious violations of human rights and humanitarian law must also be held accountable.

629. Measures taken by all parties to the internal conflict in the Sudan must be in conformity with international law.

I. Factual and legal findings

630. In view of the findings noted in the various sections above, the Commission concludes that the Government of the Sudan and the Janjaweed are responsible for a number of violations of international human rights and humanitarian law. Some of those violations are very likely to amount to war crimes, and given the systematic and widespread pattern of many of the violations, they would also amount to crimes against humanity. The Commission further finds that the rebel movements are responsible for violations that would amount to war crimes.

631. In particular, the Commission finds that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they attacked there were rebels present, or at least some rebels were hiding there, or that there were persons supporting rebels — a fact that the Commission has been unable to verify for lack of

reliable evidence — the attackers did not take the precautions necessary to enable civilians to leave the villages or to otherwise be shielded from attack. The impact of the attacks on civilians shows that the use of military force was manifestly disproportionate to any threat posed by the rebels. In addition, it appears that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. From the viewpoint of international criminal law, such violations of international humanitarian law no doubt constitute large-scale war crimes.

632. The Commission finds that the large-scale destruction of villages in Darfur was deliberately caused, by and large, by the Janjaweed during attacks, independently or in combination with Government forces. Even though in most of the incidents the Government forces may not have participated in the destruction, their complicity in the attacks during which the destruction was carried out and their presence at the scene of destruction are sufficient to make them jointly responsible for the destruction. There was no military necessity for the destruction and devastation caused. The targets of destruction during the attacks under discussion were exclusively civilian objects. The destruction of so many civilian villages is clearly a violation of international human rights law and international humanitarian law and amounts to a very serious war crime.

633. The Commission considers that there is a consistent and reliable body of material tending to show that numerous murders of civilians not taking part in the hostilities were committed by both the Government of the Sudan and the Janjaweed. It is undeniable that mass killings occurred in Darfur and that they were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian population. The large number of killings, the apparent pattern of killing and the participation of officials or authorities are among the factors that lead the Commission to the conclusion that killings were conducted in both a widespread and a systematic manner. The mass killing of civilians in Darfur is therefore likely to amount to a crime against humanity.

634. It is apparent from the information collected and verified by the Commission that rape or other forms of sexual violence committed by the Janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a crime against humanity. The awareness of the perpetrators that their violent acts were part of a systematic attack on civilians may well be inferred from, among other things, the fact that they were cognizant that they would in fact enjoy impunity. The Commission finds that the crimes of sexual violence committed in Darfur may amount to rape as a crime against humanity, or sexual slavery as a crime against humanity.

635. The Commission considers that torture has been an integral and consistent part of the attacks against civilians by Janjaweed and Government forces. Torture and inhuman and degrading treatment can be considered to have been committed in both a widespread and systematic manner, amounting to a crime against humanity. In addition, the Commission considers that conditions witnessed in the National Intelligence Detention Centre in Khartoum clearly amount to torture and thus constitute a serious violation of international human rights and humanitarian law.

636. It is estimated that more than 1.8 million persons have been forcibly displaced from their homes and are now hosted in internally displaced persons sites throughout Darfur as well as in refugee camps in Chad. The Commission finds that

the forced displacement of the civilian population was both systematic and widespread and that such action amounts to a crime against humanity.

637. The Commission finds that the Janjaweed have abducted women, conduct which may amount to enforced disappearance as a crime against humanity. The incidents investigated establish that the abductions were systematic and were carried out with the acquiescence of the State, as the abductions followed combined attacks by Janjaweed and Government forces and took place in their presence and with their knowledge. The women were kept in captivity for a sufficiently long period of time, and their whereabouts were not known to their families throughout the period of their confinement. The Commission also finds that the restraints placed on the internally displaced population in camps, particularly women, by terrorizing them through acts of rape or killings or threats of violence to life or person by the Janjaweed, amount to severe deprivation of physical liberty in violation of rules of international law. The Commission also finds that the arrest and detention of persons by the State security apparatus and the Military Intelligence, including during attacks and intelligence operations against villages, apart from constituting serious violations of international human rights law may also amount to the crime of enforced disappearance, a crime against humanity, as the acts were both systematic and widespread.

638. In a vast majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masalit and Zaghawa tribes, which were systematically targeted on political grounds in the context of the counter-insurgency policy of the Government. The pillaging and destruction of villages, being conducted on a systematic as well as widespread basis in a discriminatory fashion, appears to have been directed to bring about the destruction of livelihoods and the means of survival of those populations. The Commission also considers that the killing, displacement, torture, rape and other sexual violence against civilians was of a discriminatory character and may constitute persecution, a crime against humanity.

639. While the Commission did not find a systematic or a widespread pattern to violations committed by rebels, it nevertheless found credible evidence that members of SLA and JEM were responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, those violations included cases of murder of civilians and pillage.

II. Do the crimes perpetrated in Darfur constitute acts of genocide?

640. The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led members of African and Arab tribes to perceive themselves and others as two distinct ethnic groups. The rift between tribes and the political polarization around the rebel opposition to the central authorities have been extended to issues of identity. The tribes in Darfur

supporting rebels have increasingly come to be identified as "African" and those supporting the Government as "Arab". However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking, the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

641. The Commission does recognize that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case-by-case basis.

642. The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from the gravity of the crimes perpetrated in that region. Depending on the circumstances, such international offences as crimes against humanity or large-scale war crimes may be no less serious and heinous than genocide. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale and have so far gone unpunished.

III. Who are the perpetrators?

643. In order to identify the perpetrators, as requested by the Security Council, the Commission decided that the most appropriate standard was to require a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime. The Commission therefore has not made final judgements as to criminal guilt; rather, it has made an assessment of possible suspects that will pave the way for future investigations and possible indictments by a prosecutor, and convictions by a court of law.

644. Those identified as possibly responsible for the above-mentioned violations consist of individual perpetrators, including officials of the Government of the Sudan, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity. Some Government officials, as well as members of militia forces, have also been named as possibly responsible for joint criminal enterprise to commit international crimes. Others are identified for their possible involvement in planning and/or ordering the commission of international crimes, or of aiding and abetting the perpetration of such crimes. The Commission has also identified a number of senior Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are named as suspected of participating in a joint criminal enterprise to commit international crimes, and as possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels. The Commission has collected sufficient and consistent material (both testimonial and documentary) to point to numerous suspects (51). Some of those persons are

suspected of being responsible for more than one reason, and for more than one crime.

645. The Commission has decided to withhold the names of those persons from the public domain. This decision is based on three main grounds: (a) the importance of the principles of due process and respect for the rights of the suspects; (b) the fact that the Commission has not been vested with investigative or prosecutorial powers; and (c) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead will include the names in a sealed file that will be placed in the custody of the Secretary-General. The Commission recommends that the file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court), who will use that material as he or she deems fit for his or her investigations. A distinct and very voluminous sealed file, containing all the evidentiary material collected by the Commission, will be handed over to the United Nations High Commissioner for Human Rights. That file should also be delivered to a competent prosecutor.

646. The Commission's mention of the number of individuals it has identified should not, however, be taken as an indication that the list is exhaustive. Numerous other possible perpetrators who have been identified without sufficient evidence to name them as suspects can be found in the sealed body of evidentiary material to be handed over to the High Commissioner for Human Rights. Furthermore, the Commission has gathered substantial material on various influential individuals, institutions, groups of persons or committees that have played a significant role in the conflict in Darfur, including planning, ordering, authorizing and encouraging attacks. These include but are not limited to the military, the National Security and Intelligence Service, military intelligence and the Security Committees in the three States of Darfur. Those institutions should be carefully investigated so as to determine the possible criminal responsibility of individuals taking part in their activities and deliberations.

IV. The Commission's recommendations concerning measures designed to ensure that those responsible are held accountable

A. Measures that should be taken by the Security Council

647. With regard to the judicial accountability mechanism, the Commission strongly recommends that the Security Council refer the situation in Darfur to the International Criminal Court pursuant to article 13(b) of its Statute. Many of the alleged crimes documented in Darfur have been widespread and systematic. They meet all the thresholds set in the Statute. The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes.

648. The Commission is of the view that resorting to the International Criminal Court would have at least six major merits. First, the Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under article 13(b) of the Statute. The investigation and prosecution of crimes perpetrated in Darfur would

have an impact on peace and security. More particularly, it would be conducive, or contribute, to peace and stability in Darfur by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus is difficult or even impossible, resort to the Court, the only truly international institution of criminal justice, would ensure that justice is done. The fact that trial proceedings would be conducted in The Hague, the seat of the Court, far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions. Third, only the authority of the Court, backed up by that of the Security Council, might impel both leading personalities in the Sudanese Government and the heads of rebel groups to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the organ best suited for ensuring a veritably fair trial of those indicted by the Court's Prosecutor. Fifth, the Court could be activated immediately, without any delay (which would be the case if ad hoc tribunals or so-called mixed or internationalized courts were to be established). Sixth, the institution of criminal proceedings before the Court, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community.

649. The Security Council should, however, act not only against the perpetrators, but also on behalf of victims. In this respect, the Commission proposes the establishment of an international compensation commission consisting of 15 members, 10 appointed by the Secretary-General and 5 by an independent Sudanese body.

B. Action that should be taken by the Sudanese authorities

650. The Government of the Sudan has been put on notice concerning the serious crimes that are allegedly taking place in Darfur. It was requested not only by the international community, but more importantly by its own people, to put an end to the violations and to bring the perpetrators to justice. It must take serious measures to address those violations. The Commission of Inquiry therefore recommends that the Government of the Sudan:

(a) End impunity for the war crimes and crimes against humanity committed in Darfur. A number of measures must be taken in this respect. It is essential that Sudanese laws be brought into conformity with human rights standards through, inter alia, abolishing the provisions that permit the detention of individuals without judicial review, the provisions granting officials immunity from prosecution as well as the provisions on specialized courts;

(b) Respect the rights of internally displaced persons and fully implement the Guiding Principles on Internal Displacement, particularly with regard to facilitating their voluntary return in safety and dignity;

(c) Strengthen the independence and impartiality of the judiciary and confer on courts adequate powers to address human rights violations;

(d) Grant the International Committee of the Red Cross and the United Nations human rights monitors full and unimpeded access to all those detained in connection with the situation in Darfur;

(e) Ensure the protection of all the victims and witnesses of human rights violations, particularly those who were in contact with the Commission of Inquiry, and ensure the protection of all human rights defenders;

(f) With the help of the international community, enhance the capacity of its judiciary through the training of judges, prosecutors and lawyers, with emphasis placed on human rights law, humanitarian law and international criminal law;

(g) Fully cooperate with the relevant human rights bodies and mechanisms of the United Nations and the African Union, particularly the special representative of the Secretary-General on human rights defenders;

(h) Create, through a broad consultative process including civil society and victim groups, a truth and reconciliation commission once peace is established in Darfur.

C. Measures that could be taken by other bodies

651. The Commission also recommends that measures designed to break the cycle of impunity include the exercise by other States of universal jurisdiction, as outlined elsewhere in the present report.

652. Given the seriousness of the human rights situation in Darfur and its impact on the human rights situation in the Sudan, the Commission recommends that the Commission on Human Rights consider re-establishing the mandate of the Special Rapporteur on human rights in the Sudan.

653. The Commission recommends that the United Nations High Commissioner for Human Rights issue public and periodic reports on the human rights situation in Darfur.

(*Signed*) Antonio **Cassese**
Chairman

(*Signed*) Mohammed **Fayek**

(*Signed*) Hina **Jilani**

(*Signed*) Dumisa **Ntsebeza**

(*Signed*) Therese **Striggner-Scott**

Geneva, 25 January 2005

Annex I

Curricula vitae of the members of the Commission

Antonio Cassese (Chairman)

Professor Cassese was a judge (1993-2000) and the first President (1993-97) of the International Tribunal for the Former Yugoslavia. He also served as a member of the Italian delegation to the United Nations Commission on Human Rights and the Council of Europe Steering Committee on Human Rights and was President of the Council of Europe Committee against Torture (1989-1993).

He has taught international law at the University of Florence and the European University Institute in Florence. In 2002 he was the recipient of the prize granted by the Academie universelle des cultures presided over by Nobel Peace Prize winner Elie Wiesel for his exceptional contribution to the protection of human rights in Europe and the world. Professor Cassese has published extensively on issues of international human rights and international criminal law and is the author of *International Law*, 2nd ed. (Oxford University Press, 2005) and *International Criminal Law* (Oxford University Press, 2003). He is the co-founder and co-editor of the *European Journal of International Law* and founder and editor-in-chief of the *Journal of International Criminal Justice*. He has been granted doctorates *honoris causa* by the Erasmus University at Rotterdam, Paris XIII University and the University of Geneva, and is a member of the Institut de droit international.

Mohammed Fayek

Mohammed Fayek is the Secretary-General of the Arab Organization for Human Rights, a non-governmental organization which defends human rights in the Arab region. He is a member of the National Council for Human Rights in Egypt and the Egyptian Council for Foreign Affairs, and is Vice-President of the Egyptian Committee for Afro-Asian Solidarity. He is the owner and director-general of Dar El-Mustaqbal El-Arabi publishing house.

Mr. Fayek has previously served in Egypt as Minister of Information, Minister of State for Foreign Affairs, Minister of National Guidance and Chef de Cabinet and Adviser to the President for African and Asian Affairs. He was an elected member of the Egyptian Parliament for two consecutive terms for the Kasr El-Nil constituency in Cairo.

Hina Jilani

Hina Jilani has been the Special Representative of the Secretary-General on human rights defenders since the establishment of the mandate in 2000. She is an advocate of the Supreme Court of Pakistan and has been a human rights defender for many years, working in particular in favour of the rights of women, minorities and children. She was a co-founder of the first all-women law firm in Pakistan in 1980 and founded the country's first legal aid centre in 1986.

Ms. Jilani is the Secretary-General of the Human Rights Commission of Pakistan. She has been a member of the Council and Founding Board of International Council of Human Rights Policy; the Steering Committee of the Asia Pacific Forum for Women Law and Development; the International Human Rights

Council at the Carter Centre; and the Women's Action Forum in Pakistan. She is a member of the District High Court and Supreme Court Bar Associations of Pakistan.

Dumisa Ntsebeza

In 1995, Dumisa Ntsebeza was appointed as a Commissioner on the Truth and Reconciliation Commission in South Africa. He led the Commission's Investigative Unit, was the head of its Witness Protection Programme and served occasionally as Deputy and Acting Chair. Mr. Ntsebeza is the founder and former president of the South African National Association of Democratic Lawyers and a past President of South Africa's Black Lawyers Association. He has served as acting judge on the High Court of South Africa as well as the South African Labour Court.

Mr. Ntsebeza has lectured at the University of Transkei and chaired the institution's governing body, the University of Transkei Council. He has been a visiting Professor of Political Science and Law at the University of Connecticut. He is an advocate of the High Court of South Africa and a member of the Cape Bar, and currently holds chambers in Cape Town.

Therese Striggner-Scott

Ms. Striggner-Scott is a barrister and principal partner with a legal consulting firm in Accra, Ghana. She has served as judge of the High Courts of Ghana and Zimbabwe and was the Executive Chairperson of the Ghana Law Reform Commission from January 2000 to February 2004. She was a member of the Standing Commission of Inquiry Regarding Public Violence and Intimidation in South Africa (the "Goldstone Commission").

Ms. Striggner-Scott has held various diplomatic titles, including Ambassador of Ghana to France (with accreditations to Spain, Portugal, Greece and the Holy See, as well as the United Nations Educational, Scientific and Cultural Organization (UNESCO)) and to Italy (with accreditations to Turkey, Croatia, Slovenia and Greece as well as the Food and Agriculture Organization of the United Nations, the World Food Programme and the International Fund for Agricultural Development). She has served as a member of the UNESCO Legal Commission and was an elected member of the organization's Executive Board. She was also a member of the Conventions and Recommendations Committee and the Executive Board's human rights body, and served as Chair of the Committee at the one hundred fortieth session of the Executive Board.

Annex II

Official meetings held with the Government of the Sudan and with the Sudan Liberation Movement/Army and the Justice and Equality Movement

I. Sudanese governmental representatives

A. Khartoum

- First Vice-President, Ali Osman Mohammed Taha
- Director-General, National Security and Intelligence Service, Major General Sallah Gosh
- Minister of Justice, Ali Mohamed Osman Yasin
- Minister for Foreign Affairs, Mustafa Osman Ismail
- Minister of the Interior and Special Representative of the President to Darfur, Abdel Rahim Mohammed Hussein
- State Minister for the Interior, Ahmed Mohammed Haroon
- Minister of Federal Affairs, Nafi Nafi
- Minister of International Cooperation, Yusuf Takana
- Minister of Defence, General Bakri Hassan Saleh
- Deputy Chief Justice and other members of the judiciary
- Deputy Director of Military Intelligence, General El Fadil
- Speaker of Parliament and other members
- Members of the National Commission of Inquiry in Darfur, Professor Dafa Allah Elhadj Yousuf
- Rapporteur of the Advisory Council on Human Rights, Abdelmonem Osman Mohamed Taha
- Members of the Rape Committee
- Members of the Committee on Darfur to Assist the International Commission on Darfur; Chairman, Major General Magzoub

B. Northern Darfur

- Governor (*Wali*) of Northern Darfur, Mr. Kibul
- Army: Major General Ismat Abdulrahim Zeimat Abidi, Director of Operations, Ministry of Defence, Khartoum
- Chief Prosecutor, Moulana El Gadi
- Chief Justice, Hisham Mohamed Youssef
- Police, Hassan Mohamed Ibrahim
- National Security, Deputy Director, Saleh Saddiq Mohamed

C. Southern Darfur

- *Wali* of Southern Darfur, Ata Al-AlMoneim
- General-Secretary of Government

- Chief Justice of Southern Darfur
- Judge of Nyala Specialized Court, Murtar Ibrahim
- Director of National Security for Southern Darfur State, Colonel Abdel Razim
- Chief of Police of Nyala, Adedin El Taher Al Haj
- Chief of Police of Zalinguei
- Head of the sixteenth division in charge of Southern Darfur, Brigadier Abdallah Abdo
- Head of military intelligence, Colonel Hoseith Abdelmelik Ahmedelsheik
- Captain Adel Youssif, legal adviser, head of the judiciary branch of the military
- Representatives of their movement to the African Union Ceasefire Commission: Mohammed Adam and Ahmed Fadi (SLA) and Magil Hassin (JEM)

D. Western Darfur

- *Wali* of Western Darfur, Sulieman Abdalla Adam
- Chief Justice and members of the judiciary and the specialized courts, Court of Appeals, Public Court and District Court; so-called legal adviser to the *Wali*
- Attorney-General/Chief Prosecutor and legal adviser to the *Wali*
- Minister of Cultural and Social Affairs, acting Minister of Health and Deputy *Wali*, Jaffar Abdul Hakam
- Military Commander of Western Darfur, 22nd Division, name recorded as Brigadier General Samsadin
- Deputy Commissioner of Police, El Geneina
- Head of national security, Western Darfur, El Geneina

II. Sudan Liberation Movement/Army and Justice and Equality Movement representatives

1. Sudan Liberation Movement/Army

- Minnie Arkawi Minawi, Chairman of the Sudanese Liberation Movement/Army
- Military commander and humanitarian director, Suleiman Jamos
- Representative of SLM/A in the African Union Ceasefire Commission in three areas: El Fashir, El Geneina and Nyala

2. Justice and Equality Movement

- Dr. Khalil Ibrahim Mohammed, Chairman of the Justice and Equality Movement

Annex III

Places visited

Cities, towns, villages and sites in the Sudan

- Abu Shouk Camp
- Adwa
- Amika Sara
- Baram
- Deleig
- El Fashir
- El Geneina
- Fato Borno camp
- Garsila
- Habila
- Haloof
- Kabkabiya
- Kass
- Khartoum
- Kulbus
- Kutum
- Mornei
- Nyala
- Shataya
- Taisha
- Tawila
- Towing
- Wadi Saleh
- Zalinguei
- Zam Zam camp
- "School" internally displaced persons camp, Kass
- Abeche, Chad
- Bredjing refugee camp
- Camp of Kalma
- Camp of Nyala

- Camp of Otash
- Camp of Zalinguei
- Hamadiya camp, Zalinguei

Detention centres

- National Security Detention Centre, Khartoum
- National Security Detention Centre, Nyala
- National Intelligence Detention Centre, Khartoum
- Kober prison, Khartoum

Places visited outside the Sudan

- Asmara, Eritrea
- Addis Ababa, Ethiopia
- Abeche and Adré, Chad

Annex IV

Public reports on Darfur consulted by the Commission

The International Commission of Inquiry reviewed numerous reports, from both public and confidential sources, in relation to the conflict in Darfur. The following is a non-exhaustive list of the public reports consulted by the Commission. The titles of non-public reports are not listed for reasons of confidentiality.

United Nations

1. Darfur region: incidents of violence against civilians reported to the United Nations, February-September 2004
2. United Nations inter-agency fact-finding and rapid-assessment mission, Kailek Town, South Darfur, 25 April 2004
3. Joint communiqué of the Government of the Sudan and the United Nations signed on 3 July 2004 (S/2004/635, annex)
4. Report of the Secretary-General pursuant to paragraphs 6 and 13 to 16 of Security Council resolution 1556 (2004) (S/2004/703)
5. Report of the Secretary-General on the Sudan pursuant to paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004), paragraph 15 of Security Council resolution 1564 (2004) and paragraph 17 of Security Council resolution 1574 (2004) (S/2004/947)
6. Report of the Secretary-General on the Sudan pursuant to paragraph 15 of Security Council resolution 1564 (2004) and paragraphs 6, 13 and 16 of Security Council resolution 1556 (2004) (S/2004/881)
7. United Nations high-level inter-agency mission to Darfur, 27 April-2 May 2004
8. Security Council resolution 1547 (2004)
9. Security Council resolution 1556 (2004)
10. Security Council resolution 1564 (2004)

Office of the United Nations High Commissioner for Human Rights

11. Situation of human rights in the Darfur region of the Sudan (E/CN.4/2005/3)
12. October, November and December 2004 reports
13. Final report of the first African regional consultation on violence against women with the Special Rapporteur of the Commission on Human Rights on violence against women and the Special Rapporteur of the African Commission on Human and Peoples' Rights on women's rights, Khartoum, 25 September-2 October 2004
14. Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions on her mission to the Sudan (E/CN.4/2005/7/Add.2)

15. Report of the Representative of the Secretary-General on internally displaced persons on his mission to the Sudan — the Darfur crisis (E/CN.4/2005/8)

Office for the Coordination of Humanitarian Affairs

16. "Deteriorating security threatens to plunge Darfur into 'chaos', Under-Secretary-General warns Security Council", press release, 7/12/2004 (SC/8262)

The Sudan, United Nations country team

17. Weekly round-up of current developments, 31 May-5 June 2004
18. Office of the United Nations Resident and Humanitarian Coordinator for the Sudan, 6 December 2003 and 22 March 2004
19. United Nations country team Darfur update, 26 July 2003

Office of the United Nations High Commissioner for Refugees

20. The Darfur crisis and Chad mediation

United Nations Children's Fund

21. Challenges of sociocultural reconstruction and unity in southern Sudan, 7 January 2004

World Health Organization

22. Retrospective mortality survey among the internally displaced population, greater Darfur, Sudan, August 2004

African Union

23. Ceasefire agreement and protocol, 8 April 2004
24. Ceasefire Commission agreement, 28 May 2004
25. Conference agreement, 25 April 2004
26. Humanitarian protocol, 9 November 2004
27. Press release, 2 December 2004
28. Security protocol, 9 November 2004
29. Status-of-mission agreement, 4 June 2004
30. Commission ceasefire violation report on the incident in Dar es Salaam and Wada general area (September 2004)
31. Report of the Ceasefire Commission on the situation in the Darfur conflict at the joint meeting held in N'Djamena by Brigadier General F. O. Okonkwo, Chairman, Ceasefire Commission, 4 October 2004
32. Briefing for the members of the Joint Commission for the Darfur Peace Talks held in Abuja by Brigadier General F. O. Okonkwo, Chairman, Ceasefire Commission, 23 August 2004

Intergovernmental organization reports

33. Report of the Arab League on its mission to Darfur
34. Report of the Organization of the Islamic Conference on its mission to Darfur
35. Report of the ad hoc delegation of the Committee on Development and Cooperation of the European Parliament on its mission to the Sudan from 19 to 24 February 2004

Governmental reports

36. United States Department of State report documenting atrocities in Darfur, September 2004
37. Congressional Research Service, report for Congress on Sudan: the Darfur crisis and the status of the north-south negotiations, 22 October 2004
38. Harvard University report prepared for the United States Agency for International Development on the use of rape as a weapon of war in the conflict in Darfur, Sudan, October 2004

Media and press articles

39. London, Overseas Development Institute: "Open-range management and property rights in pastoral Africa: a case of spontaneous range enclosure in south Darfur", Sudan, Roy H. Behnke Jr., August 1985
40. London, International Institute for Environment and Development: Pastoral land tenure and agricultural expansion: Sudan and the Horn of Africa, S. Shazali and A. Abdel, 1999
41. BBC: transcript of the *Panorama* programme, "The New Killing Fields", 14 November 2004
42. *Sudan Tribune*, "Arabizing an African capital: What if government brings up the African face of Sudan?", Mahgoub El-Tigani, 11 December 2004
43. Inter-Press Service, "Darfur — Hundreds of 'days of failure'", Jim Lobe, 10 December 2004
44. European Union press release: "EU mobilises an additional €80 million from African Peace Facility to support enlarged African Union observer mission in Darfur, Sudan", 26 October 2004
45. *International Herald Tribune*: "Violence against women: the unacknowledged casualties of war", Irene Khan, 18 December 2004
46. Associated Press: "Presidents of Chad and Sudan meet to discuss rebellion in Western Sudan", 13 April 2003

International non-governmental organization reports

47. Sudanese Organization against Torture
    - Human rights report on Darfur, May-October 2004

- Darfur — The tragedy continues, 28 November 2004
- Alternative report to the African Commission, May 2004

48. Sudanese Human Rights Organization

    - Sudanese Human Rights Quarterly, No. 17, February 2004
    - Ibid., No. 16, October 2003
    - Ibid., No. 15, June 2003
    - Ibid., No. 14, October 2002
    - Ibid., No. 12, January 2002
    - The situation of human rights in Sudan, 26 March 2003, 1 October 2003, 31 January 2004, 5 February 2004

49. Amnesty International

    - Darfur: "Too many people killed for no reason", 3 February 2004
    - Darfur: Extrajudicial execution of 168 men, April 2004
    - Darfur: Incommunicado detention, torture and special courts, 8 June 2004
    - Sudan: At the mercy of killers — destruction of villages in Darfur, 2 July 2004
    - Darfur: rape as a weapon of war: sexual violence and its consequences, 19 July 2004
    - Sudan: Intimidation and denial: attacks on freedom of expression in Darfur, 25 August 2004
    - Sudan: Arming the perpetrators of grave abuses in Darfur, 16 November 2004
    - Sudan: No one to complain to — no respite for the victims, impunity for perpetrators, 2 December 2004
    - Sudan: Who will answer for the crimes? 18 January 2005

50. Human Rights Watch

    - Darfur in flames: atrocities in Western Sudan, 2 April 2004
    - Darfur destroyed: ethnic cleansing by Government and militia forces in Western Sudan, 7 May 2004
    - Addressing crimes against humanity and "ethnic cleansing" in Darfur, Sudan, 24 May 2004
    - Darfur documents confirm Government policy of militia support, 20 July 2004
    - Empty promises: continuing abuses in Darfur, Sudan, 11 August 2004
    - Janjaweed camps still active, 27 August 2004
    - "If we return we will be killed": consolidation of ethnic cleansing in Darfur, Sudan, 15 November 2004

51. International Crisis Group

- Darfur deadline: A new international action plan, Africa report No. 83, 23 August 2004
- Darfur rising: Sudan's new crisis, Africa report No. 76, 25 March 2004
- Sudan: Now or never in Darfur, Africa report No. 80, 23 May 2004
- Sudan: Towards an incomplete peace, Africa report No. 73, 11 December 2003
- Sudan's dual crises: Refocusing on IGAD, Africa briefing, No. 19, 5 October 2004

52. Aegis Trust

- Darfur: Management of a genocidal crisis, 29 November 2004

Annex V

Overview of the activities of the investigative teams of the Commission

The Commission's investigation team was led by a chief investigator and included four judicial investigators, two female investigators specializing in gender violence, four forensic experts from the Argentine Forensic Anthropology Team and two military analysts.

Investigation team members interviewed witnesses and officials in Khartoum and accompanied the Commissioners on their field mission to the three Darfur States. The investigation team was then split into three sub-teams which were deployed to Northern, Southern and Western Darfur.

Western Darfur team

The team for Western Darfur was composed of two investigators and a military analyst, supported by one or two forensic experts, according to requirements. The team also had two interpreters working for it. The team was based in El-Geneina for a total of 36 days, from 27 November to 18 December 2004 and from 5 to 18 January 2005. One of the investigators also accompanied the commissioners during their visit to Western Darfur and Chad in early November 2004.

The Western Darfur team conducted 13 visits to towns and villages outside of El-Geneina for a total of 16 days, mostly travelling by road but also by way of four helicopter trips to more distant locations. The areas covered by the team included most of El-Geneina, Kulbus and Habila localities, while parts of Wadi Saleh were also visited.

In all, the team collected information concerning attacks on 51 towns or villages and 11 cases of rapes through interviews with 116 eyewitnesses and 12 circumstantial witnesses.

Throughout that process, members of the team met with representatives of most of the tribal groups in Western Darfur, including Arab nomads. The team also held meetings with Government officials, including representatives from the military, police, judiciary and administration, as well as with representatives from the rebel groups (Sudan Liberation Army (SLA) and Justice and Equality Movement (JEM)). In addition to meetings with witnesses, the team held discussions with representatives from international non-governmental organizations, United Nations agencies and the African Union.

Northern Darfur team

The team in Northern Darfur was composed of two investigators, one analyst and members of the forensic team, used on a shared basis with the Western and Southern teams. The team also employed interpreters and drivers to facilitate the mission.

The initial mission into El Fashir took place with the commissioners on 11 November 2004. During the mission, Government officials, witnesses, representatives of non-governmental organizations and other individuals were interviewed. The team returned to Khartoum with the Commissioners on

17 November 2004. The team was due to be redeployed to El Fashir on 27 November 2004, however a state of emergency in Northern Darfur was declared by the Government because of continued fighting between SLA and the Government of the Sudan and because of that and security concerns, deployment was not possible. The team was assigned to assist the Western Darfur team in its investigation until the security situation eased.

The team was later diverted to Southern Darfur where it assisted in the ongoing investigations. From 1 to 6 December 2004 the team was based in Nyala, and then it was redeployed to El Fashir until 19 December. During this period it carried out enquiries at specific targeted locations, such as internally displaced persons camps and destroyed villages, as well as with SLA contacts and Government officials. A close liaison was also formed with the African Union mission. The final deployment for the team was from 4 to 19 January 2005, during which time it concentrated on specific targets that could not be reached during the first mission. Places such as Tawila village, Kutum and the Fato Borno internally displaced persons camp are examples. A number of Government (military) officials were interviewed at length.

In total, the Northern Darfur team interviewed 141 witness, covering 98 separate incidents, 13 involving the Government of the Sudan only, 21 involving Janjaweed only and 37 involving a combination of the Government of the Sudan and Janjaweed. Twenty-six witnesses were interviewed regarding incidents involving SLA and JEM. Seven crime scenes were visited.

Southern Darfur team

The investigative team for Southern Darfur (Nyala) was composed of three investigators. The team was supported by forensic experts and investigators from other teams for several days. In addition the team had two male interpreters working for it. An international female interpreter joined the team in the final stages of the investigation to assist, particularly in sexual assault matters.

The team was based in Nyala for a total of 36 days, first from 27 November to 18 December 2004 and then from 5 to 18 January 2005.

The Southern Darfur team conducted seven visits to towns and villages outside Nyala and Kass, travelling by road and by way of four helicopter trips when roads were closed for security reasons.

The Southern Darfur team concentrated mainly on six case studies — namely, the Kailek group of towns and villages: Haloof, Taisha, Adwa, Anika Sara and Baram — collecting detailed information on each of the cases, including the versions of the suspected parties. The team also collected information on a very recent attack on a village which occurred on 14 January 2005.

In addition, the team collected information concerning 39 rape and sexual assault cases. A number of interviews were conducted with Government officials. The team also interviewed representatives from JEM and SLA. Finally, the team held discussions with representatives from international non-governmental organizations, United Nations agencies and the African Union.

The forensic team conducted crime scene examinations in 16 areas.